

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(1) IN GENERAL/751. Distinction between rentcharge and annuity.

## **RENTCHARGES AND ANNUITIES (**

### **The National Assembly for Wales and the Welsh Ministers; transfer of functions**

The Government of Wales Act 1998 established the National Assembly for Wales, and transferred specified functions, with or without modifications, and subject in some cases to supplementary provisions, to it. The Government of Wales Act 2006 re-establishes the National Assembly for Wales and establishes the Welsh Assembly Government, and transfers specified functions, with or without modifications, and subject in some cases to supplementary provisions, to the Welsh Ministers. See generally CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 42A et seq.

Functions of a Secretary of State or a Minister of the Crown under the Rentcharges Act 1977 are transferred to the National Assembly for Wales, in so far as they are exercisable in relation to Wales, by the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1.

## **1. NATURE OF RENTCHARGES AND ANNUITIES**

### **The National Assembly for Wales and the Welsh Ministers; transfer of functions**

As to the transfer of functions to the National Assembly for Wales and the Welsh Ministers, see the introductory note to this title.

## **(1) IN GENERAL**

### **751. Distinction between rentcharge and annuity.**

The right created by an instrument (whether a deed, will, codicil or statute) to receive a definite annual sum of money is an interest which may be either a 'rentcharge' or an 'annuity'. If the annual sum is charged on and payable exclusively out of land<sup>1</sup>, the interest is a rentcharge<sup>2</sup>. Important changes have been made to the law of rentcharges by the Rentcharges Act 1977, which (save for limited exceptions) prohibits the creation of new rentcharges after 22 August 1977, and provides for the extinguishment of existing rentcharges in the course of time<sup>3</sup>. However, if there is no charge or the annual sum is charged on personal property or a mixed fund, then the interest is an annuity<sup>4</sup>. A rentcharge charged on freehold land, or on another perpetual rentcharge, is real property<sup>5</sup>, but, if charged on leasehold land, although properly called a rentcharge, it is a chattel real in the nature of personal property<sup>6</sup>. An annuity is personal property<sup>7</sup>. A basic distinction between a rentcharge and an annuity is that a rentcharge is recoverable by distress<sup>8</sup> whereas, in the absence of express provision<sup>9</sup>, an annuity is not so recoverable<sup>10</sup>. The difference between real and personal property is of importance in connection with the administration of the estates of deceased persons<sup>11</sup> and especially in relation to inheritance tax<sup>12</sup>.

<sup>1</sup> For the meaning of 'land' see generally REAL PROPERTY vol 39(2) (Reissue) PARA 76.

2 *Savery v Dyer* (1752) Amb 139; *Weston v Bowes* (1742) 9 Mod Rep 309; *Buttery v Robinson* (1826) 3 Bing 392; *Ramsay v Thorngate* (1849) 16 Sim 575, where the gift was to A, her executors, administrators and assigns; *Patching v Barnett* (1881) 51 LJ Ch 74, CA; *Re Waring, Greer v Waring* [1896] 1 IR 427.

3 See the Rentcharges Act 1977 ss 2, 3, 18(2) (s 2 amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 15(1), (2)). The Rentcharges Act 1977 implements, with some modifications, the recommendations made by the Law Commission in their *Report on Rentcharges* (Law Com no 68), and is based upon the draft Bill appended to that report. The main provisions of the Rentcharges Act 1977 are those which prohibit the creation of ordinary rentcharges (see s 2 (as amended); and PARA 774 post), provide for the compulsory extinguishment of existing rentcharges (see s 3; and PARA 894 post), and provide for the redemption and apportionment of rentcharges in the place of existing procedures (see ss 4-10 (as amended); and PARAS 844 et seq, 900 et seq post). It follows that (save for the prohibition provisions) the law relating to rentcharges in this title will apply mainly to rentcharges in existence before the creation of rentcharges was prohibited by the Rentcharges Act 1977, and then only until those rentcharges are in due course extinguished, and to the limited classes of rentcharge which are destined to survive.

The Rentcharges Act 1977 applies in relation to any land in which there subsists a Crown interest as it applies in relation to land in which no such interest subsists: s 14(1). 'Crown interest' means an interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster or to the Duchy of Cornwall or to a government department, or which is held in trust for Her Majesty for the purposes of a government department: s 14(2).

4 *Savery v Dyer* (1752) Amb 139; *Aubin v Daly* (1820) 4 B & Ald 59; *Radburn v Jervis* (1841) 3 Beav 450; Co Litt 20a; 2 Bl Com (14th Edn) 40. As to the creation of annuities see PARA 790 et seq post. As to personal property see PERSONAL PROPERTY vol 35 (Reissue) PARA 1201 et seq.

5 See eg *Savery v Dyer* (1752) Amb 139 at 140; and see PARA 758 post.

6 *Re Fraser, Lowther v Fraser* [1904] 1 Ch 726, CA. See also *St Auby's Case* (1590) Cro Eliz 183; *Saffery v Elgood* (1834) 1 Ad & El 191; *Wiltshire v Rabbits* (1844) 14 Sim 76; *Martin v Haynes* (1892) 29 LR Ir 416; and see PARA 781 post. As to chattels real see generally REAL PROPERTY vol 39(2) (Reissue) PARAS 1, 3.

7 See PARA 763 post.

8 See PARAS 753, 869-870 post.

9 As to the recovery of an annuity charged by an order under the Housing Act 1957 ss 14, 15 (repealed) or the Housing Act 1985 s 230 (repealed with savings) see PARAS 809, 906 post.

10 As to the recovery of annuities see generally para 885 et seq post.

11 See PARA 832 et seq post.

12 See PARA 862 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(1) IN GENERAL/752. Rentcharges and annuities in the administration of estates.

## **752. Rentcharges and annuities in the administration of estates.**

The question whether annual payments are in the nature of a rentcharge or an annuity may be important, where the payments arise under a will, in determining the fund out of which they are payable<sup>1</sup>, or, where the payments were payable to a deceased person and continue payable to his estate after his death, in determining whether the right to the payments passes under a general or residuary charge or bequest in that person's will<sup>2</sup>.

1 See PARA 832 post.

2 See eg *Re Fraser, Lowther v Fraser* [1904] 1 Ch 726, CA. The question whether the payments constitute a rentcharge or annuity is no longer of importance in determining the persons beneficially entitled after the death of the deceased where the deceased dies intestate, as the old rules of descent have in general been abolished

in the case of death after 1925, and the same rules of intestate succession apply to all property as to which a deceased person dies intestate: see the Administration of Estates Act 1925 s 45; and EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/753. Meaning of 'rentcharge'.

## (2) NATURE OF A RENTCHARGE

### 753. Meaning of 'rentcharge'.

A rentcharge is an annual sum issuing out of land, but not as an incident of tenure<sup>1</sup>, the due payment of which is secured by a right of distress<sup>2</sup>. It is called a rentcharge because the land in respect of which it is paid is charged with a distress<sup>3</sup>. Where there was no power of distress the rent was called a rent seck<sup>4</sup>.

In some cases the power to distrain for a rentcharge could arise at common law, apart from any express reservation<sup>5</sup>. In 1731 the like remedy by distress and sale as in the case of rent reserved upon lease was extended to rents seck<sup>6</sup>, and rents and annuities charged on land were in effect converted into rentcharges<sup>7</sup>. A person entitled under an instrument which came into operation after 1881 to receive an annual sum out of any land or out of the income of any land, whether charged by way of rentcharge or otherwise, not being rent incident to a reversion, now has a statutory power of distress and certain other statutory remedies<sup>8</sup>.

<sup>1</sup> See PARA 755 post.

<sup>2</sup> Co Litt 143b, 144a, 218a, 218b; Tudor, LC Real Prop (4th Edn) 41; Gilbert on Rents 16; 2 Bl Com (14th Edn) 42; 18 Vin Abr 475, Rent (D); Com Dig, Rent (C) 6; *Weston v Bowes* (1742) 9 Mod Rep 309; *West v Robson* (1858) 3 CBNS 422 at 438.

<sup>3</sup> Co Litt 143b; *Weston v Bowes* (1742) 9 Mod Rep 309 at 310; *Re Lord Gerard and Beecham's Contract* [1894] 3 Ch 295 at 308, 311, CA.

<sup>4</sup> Littleton's Tenures s 218; *Weston v Bowes* (1742) 9 Mod Rep 309 at 310; and see DISTRESS vol 13 (2007 Reissue) PARA 905.

<sup>5</sup> See Co Litt 147a, where it is said that if a man seised of land in fee binds his goods and land to the payment of a yearly rent, this is a good rentcharge with power to distrain, albeit there be no express words of charge, nor to distrain; *Rodham v Berry* (1826) 4 LJOSKB 202 (rentcharge created by will); *Monypenny v Monypenny* (1861) 9 HL Cas 114 at 137-138. The power arose where a rent was granted (1) to a widow in lieu of dower; (2) for equality of exchange; or (3) by one coparcener to another for equality of partition: Gilbert on Rents 19-20.

<sup>6</sup> Landlord and Tenant Act 1730 s 5. Fealty was an inseparable incident to a reversion: Co Litt 143a. The right of distress was inseparably incident to fealty: Gilbert on Rents 5, 107. Hence every rent incident to a reversion carries the right of distress. See further DISTRESS vol 13 (2007 Reissue) PARA 902; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 242.

<sup>7</sup> See *Buttery v Robinson* (1826) 3 Bing 392 (annuity charged on freehold land by will); *Sollory v Leaver* (1869) LR 9 Eq 22 at 24-25 (annuity charged on freehold land by will); *Kelsey v Kelsey* (1874) LR 17 Eq 495 (annuity charged on leaseholds by will); *Roper v Roper* (1876) 3 ChD 714 at 720; *Re Lord Gerard and Beecham's Contract* [1894] 3 Ch 295 at 311, CA (rent reserved on a conveyance, where it was said that it was the right of distress which made the rent a rentcharge). See also *Fairfax v Gray* (1779) 2 Wm Bl 1326 (annuity); *Saward v Anstey* (1825) 2 Bing 519; *Dodds v Thompson* (1865) LR 1 CP 133 at 137 (charge by deed).

<sup>8</sup> See the Law of Property Act 1925 s 121 (as amended), re-enacting and somewhat extending the Conveyancing Act 1881 s 44 (repealed); and PARA 863 et seq post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/754. Rentcharges at law and in equity.

#### **754. Rentcharges at law and in equity.**

Since 1925 a rentcharge at law can only subsist as an estate in fee simple or as a term of years absolute and must be in possession, issuing out of or charged on land, being either perpetual or for a term of years absolute<sup>1</sup>. A rentcharge (not being a rentcharge limited to take effect in remainder after or expectant on the failure or determination of some other interest) is a rentcharge in possession for this purpose, notwithstanding that the payments in respect of it are limited to commence or accrue at some time subsequent to its creation<sup>2</sup>. All other interests in a rentcharge, if validly created, take effect as equitable interests<sup>3</sup>. Examples of such equitable interests are a life interest such as a jointure, an entailed interest<sup>4</sup> and an undivided share of a rentcharge held in trust for the persons interested in the rentcharge<sup>5</sup>.

The distinction between legal and equitable interests becomes important when it is necessary to enforce payment because it is only the legal owner of a rentcharge who can do this directly, for example by distress, entry or limitation of a term<sup>6</sup>.

1 Law of Property Act 1925 s 1(1), (2)(b). See also REAL PROPERTY vol 39(2) (Reissue) PARA 45.

2 Law of Property (Entailed Interests) Act 1932 s 2.

3 See the Law of Property Act 1925 s 1(3); and EQUITY vol 16(2) (Reissue) PARA 601.

4 See *ibid* s 130 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 119; SETTLEMENTS. No further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARAS 105, 119.

5 See PARA 760 post.

6 See PARA 863 et seq post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/755. Distinction between rentcharge and rent service.

#### **755. Distinction between rentcharge and rent service.**

Rent<sup>1</sup> is either rent service<sup>2</sup> or rentcharge<sup>3</sup>. In either case it is a periodical payment made in respect of land, but the two forms of rent are fundamentally different. Rent service is incident to a reversion; it is a payment made by the tenant to the landlord as a recompense for the use of the land<sup>4</sup>, and the receipt of it constitutes the landlord's chief beneficial right from ownership of the reversion.

On the other hand a rentcharge is not an incident of tenure and the owner has no reversion<sup>5</sup>; thus a rentcharge is a burden on the ownership of the land, and, if the land is let, is in effect discharged out of the rent service which the owner receives.

1 As to rent reserved on a lease see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 242 et seq; as to distress for rent see DISTRESS vol 13 (2007 Reissue) PARA 905 et seq; and as to the limitation of actions for the recovery of land or rent see LIMITATION PERIODS vol 68 (2008) PARA 1016 et seq.

2 As to services incidental to feudal tenure and the gradual development of rent service see REAL PROPERTY vol 39(2) (Reissue) PARAS 5 et seq, 83-85.

3 According to Littleton there were three forms of rents, that is to say rent service, rentcharge and rent seck: Littleton's Tenures s 313. Rent seck was formerly a rent without power of distress, but, as a power of distress is now incident to every rent charged on land, every such rent is in effect a rentcharge: see PARA 753 ante.

4 *Esdaile v Stephenson* (1822) 1 Sim & St 122 at 124.

5 See note 4 supra.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/756. Fee farm rent and other obsolete rents.

### **756. Fee farm rent and other obsolete rents.**

Fee farm rent is rent reserved upon a grant in fee<sup>1</sup>. It is included in the definition of 'rentcharge' in the Law of Property Act 1925<sup>2</sup>, and is for practical purposes indistinguishable. Chief rent and quit rent were manorial incidents, which have been extinguished by statute<sup>3</sup>. In certain parts of England it was a common practice to sell building land in consideration of a perpetual rentcharge<sup>4</sup>. These rentcharges were sometimes incorrectly called chief rents.

1 See Co Litt 143b; 2 Bl Com (14th Edn) 43; and the notes to *Bradbury v Wright* (1781) 2 Doug KB 624 at 627n, where it is said that the rent must be at least one-fourth of the value of the land at the time of the reservation.

2 Law of Property Act 1925 s 205(1)(xxiii). See also the Administration of Estates Act 1925 s 55(1)(xxi).

3 See the Law of Property Act 1922 ss 128(2) proviso (repealed), 138 (repealed); and REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq. See also CUSTOM AND USAGE.

4 This practice has generally ceased by reason of the prohibition (with limited exceptions) of the creation of new rentcharges as from 22 August 1977 by the Rentcharges Act 1977 s 2 (as amended): see PARAS 774, 780 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/757. Tithe rentcharge.

### **757. Tithe rentcharge.**

A rentcharge in the ordinary sense is to be distinguished from tithe rentcharge which was a right to receive part of the produce of land commuted for an annual sum, while a rentcharge is charged on the land itself<sup>1</sup>. Tithe rentcharge, however, was extinguished<sup>2</sup> (with an exception of little practical importance) and replaced by redemption annuities charged in respect of land and payable to the Crown for 60 years, the tithe owner being compensated with redemption stock; and those tithe redemption annuities, charged under the Tithe Acts 1936 and 1951<sup>3</sup>, were extinguished as from 2 October 1977<sup>4</sup>.

- 1 *Bailey v Badham* (1885) 30 ChD 84 at 89.
- 2 See ECCLESIASTICAL LAW vol 14 para 1213.
- 3 See ECCLESIASTICAL LAW vol 14 para 1215 et seq.
- 4 Finance Act 1977 s 56.

## UPDATE

### 757 Tithe rentcharge

TEXT AND NOTE 4--1977 Act s 56 repealed: Statute Law (Repeals) Act 2004.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/758. Incorporeal nature of rentcharge.

### 758. Incorporeal nature of rentcharge.

A rentcharge in fee simple is an incorporeal hereditament<sup>1</sup> and is real property<sup>2</sup>. A rentcharge for a term of years is a chattel real and, although incorporeal, cannot properly be described as a hereditament as it is personal property<sup>3</sup>. Where a rentcharge was charged on both freeholds and leaseholds, it has been considered as issuing out of the freeholds but nevertheless with a right to distrain on the leaseholds<sup>4</sup>.

A rentcharge is normally a sum certain but may be a fluctuating sum<sup>5</sup>.

1 Co Litt 49a; 2 Bl Com (14th Edn) 20; *Re Brewer* (1875) 1 ChD 409 at 410, CA; and see REAL PROPERTY vol 39(2) (Reissue) PARA 81. It has been considered that the treatment in English law of a rentcharge as an incorporeal hereditament is arbitrary: Pollock's Principles of Contract (13th Edn) 189 note.

2 *Savery v Dyer* (1752) Amb 139. A rentcharge has been said to be an interest in the land itself (*Creed v Creed* (1844) 11 Cl & Fin 491 at 508, HL) and to be a portion of the estate (*Pitt v Lord Dacre* (1876) 3 ChD 295 at 299). The owner of a rentcharge has, however, no estate in the property out of which it issues: *Re Bick, Edwards v Bush* [1920] 1 Ch 488 at 491 per Lawrence J. A rentcharge in fee was subject to curtesy (Co Litt 29a) and dower (Co Litt 32a; see *Chaplin v Chaplin* (1733) 3 P Wms 229). As to the abolition of tenancy by the curtesy and dower see REAL PROPERTY vol 39(2) (Reissue) PARAS 157, 161. As to the abolition of the old rules of descent see the Administration of Estates Act 1925 s 45(1); and EXECUTORS AND ADMINISTRATORS. A rentcharge granted for equality of partition descended in the same manner as the land: Co Litt 169b.

3 See PARAS 751 ante, 781 post.

4 *Butt's Case* (1600) 7 Co Rep 23a; *Richardson v Nixon* (1845) 2 Jo & Lat 250; *Drew v Barry* (1874) IR 8 Eq 260 at 279, Ir CA. See also Co Litt 147a.

5 Rentcharges used as a conveyancing device to improve the enforceability of positive covenants in development schemes are sometimes fluctuating: see *Report on Rentcharges* (Law Com no 68) PARA 49(2). As to development schemes see EQUITY vol 16(2) (Reissue) PARAS 624-626.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/759. Rentcharge issuing out of another rentcharge.

### 759. Rentcharge issuing out of another rentcharge.

At common law, a rentcharge cannot be created by a subject so as to issue out of a rent<sup>1</sup> or other incorporeal hereditament<sup>2</sup>. However, by virtue of its prerogative, the Crown can create a rentcharge issuing out of an incorporeal hereditament<sup>3</sup>, and a subject may do the same under statutory powers<sup>4</sup>. By statute a rentcharge or other annual sum (not being rent incident to a reversion), payable half yearly or otherwise, may be granted, reserved, charged or created out of or on another rentcharge or annual sum (not being rent incident to a reversion) charged on or payable out of land or on or out of the income of land, in the like manner as it could have been made to issue out of land<sup>5</sup>. The powers of the Crown and those of the subject are now, however, severely restricted in this respect by the prohibition of the creation of new rentcharges (with limited exceptions) as from 22 August 1977 by the Rentcharges Act 1977<sup>6</sup>.

1 *Earl of Stafford v Buckley* (1750) 2 Ves Sen 170 at 178.

2 *Gardiner v Williamson* (1831) 2 B & Ad 336 at 339; *Re Alms Corn Charity, Charity Comrs v Bode* [1901] 2 Ch 750 at 759; Co Litt 47a; Gilbert on Rents 21.

3 Co Litt 47a; Gilbert on Rents 22; *A-G v Coventry Corp* (1715) 1 P Wms 306; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 846.

4 *Re Lord Gerard and Beecham's Contract* [1894] 3 Ch 295 at 315, CA, where a rent reserved under statutory powers out of an easement was held to have been properly described in the contract for sale as a rentcharge. Cf *Re Baxter's Trusts, Malling v Addison* (1910) 103 LT 427 (affd (1911) 104 LT 710, CA); and see PARA 763 post.

5 Law of Property Act 1925 s 122(1). Without prejudice to any order of court made before 1926, s 122 operates to confirm any annual sum which would have been validly created if the section had been in force: s 122(4). See further PARA 866 post. Such rentcharges are, however, extremely rare: see *Report on Rentcharges* (Law Com no 68) PARA 11 note 8.

6 See the Rentcharges Act 1977 s 2 (as amended); and PARA 774 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/760. Undivided shares.

## **760. Undivided shares.**

A rentcharge, being land within the meaning of the Law of Property Act 1925<sup>1</sup>, cannot be held at law in undivided shares<sup>2</sup>. Where a rentcharge is conveyed or devised to two or more persons in undivided shares, it is vested in trustees in trust for the persons interested in the rentcharge<sup>3</sup>, whether the disposition is made, or comes into operation, before, on or after the commencement of the Trusts of Land and Appointment of Trustees Act 1996<sup>4</sup>. A beneficiary as such cannot distrain<sup>5</sup>.

1 See the Law of Property Act 1925 s 205(1)(ix), (xxiii) (s 205(1)(ix) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and PARA 761 post.

2 Law of Property Act 1925 s 1(6): see REAL PROPERTY vol 39(2) (Reissue) PARA 55.

3 See *ibid* ss 34, 39(4), Sch 1 Pt IV (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 55 et seq.

4 *le* 1 January 1997: see the Trusts of Land and Appointment of Trustees Act 1996 s 27(1); and the Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996, SI 1996/2974.

5 *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79. Before 1926 a rentcharge might be divided and the land rendered liable to several distresses: *Rivis v Watson* (1839) 5 M & W 255; and see *Whitley v Roberts* (1825) M'Cle & Yo 107; *Ards v Watkin* (1598) Cro Eliz 637 at 651; *Warner v Baynes* (1750) Amb 589; *Harrison v Barnby* (1793) 5 Term Rep 246. See further PARA 870 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(2) NATURE OF A RENTCHARGE/761. Application of certain Acts to rentcharges.

## **761. Application of certain Acts to rentcharges.**

Unless the context otherwise requires, a rent or other incorporeal hereditament and a right or benefit over or derived from land are included within the meaning of 'land' for the purposes of the Law of Property Act 1925<sup>1</sup> and its associated Acts<sup>2</sup>. For the purposes of certain of those Acts 'rent' is expressly defined as including a rentcharge<sup>3</sup>. 'Land' includes rentcharges, and the meaning of 'rentcharge' is defined, in the legislation relating to the limitation of actions<sup>4</sup>. For the purpose of the statutory provisions concerning the execution of disentailing assurances<sup>5</sup>, the meaning of 'lands' extends to rents and hereditaments of any tenure, whether corporeal or incorporeal<sup>6</sup>. In the enactments which provide for the apportionment of rent and other annual payments<sup>7</sup>, 'rent' includes rentcharge and rent seck<sup>8</sup>.

A rentcharge is land for the purpose of the power of the courts to enforce judgments or orders by imposing charges on property of judgment debtors<sup>9</sup> and to appoint receivers by way of equitable execution<sup>10</sup>.

1 See the Law of Property Act 1925 s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and REAL PROPERTY vol 39(2) (Reissue) PARA 77. See also the Rentcharges Act 1977 s 13(1), which provides that in that Act 'land' has the same meaning as in the Law of Property Act 1925 s 205(1) (as amended).

2 See eg the Settled Land Act 1925 s 117(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(13)(a)); and SETTLEMENTS. Similar definitions apply for the purposes of the Land Registration Act 1925 s 3(viii) (amended by the Patronage (Benefices) Measure 1986 s 6(2); and the Trusts of Land and Appointment of Trustees Act 1996 Sch 4) (see LAND REGISTRATION); the Land Charges Act 1972 s 17(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4) (see LAND CHARGES); the Administration of Estates Act 1925 s 55(1)(via) (added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 6(1), (5)) (see EXECUTORS AND ADMINISTRATORS); and the Trustee Act 1925 s 68(6) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4) (see TRUSTS vol 48 (2007 Reissue) PARA 605).

3 See the Law of Property Act 1925 s 205(1)(xxiii), which definition is in the same terms as that in the Land Registration Act 1925 s 3(xxv) (see LAND REGISTRATION); and the Administration of Estates Act 1925 s 55(1)(xxi) (see EXECUTORS AND ADMINISTRATORS).

4 See the Limitation Act 1980 s 38(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4); and LIMITATION PERIODS vol 68 (2008) PARAS 1018, 1020. As to the extinguishment of rentcharges by lapse of time see PARA 899 post.

5 See the Fines and Recoveries Act 1833. This Act, as amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4, remains in force only as regards dealings with entailed interests as equitable interests: see the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 1. As to disentailing assurances see generally REAL PROPERTY vol 39(2) (Reissue) PARA 125 et seq. No further entailed interests may be created: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARAS 105, 119.

6 Fines and Recoveries Act 1833 s 1.

7 See the Apportionment Act 1870; and PARA 839 post.

8 See *ibid* s 5.



9 See, by virtue of the Interpretation Act 1978 ss 5, 22(1), Sch 1, the Charging Orders Act 1979 ss 1, 2 (s 1 amended by the Administration of Justice Act 1982 ss 34(3), 37, Sch 3 Pt II paras 2, 3, 6; and the County Courts Act 1984 s 148(1), Sch 2 Pt V). A rentcharge was formerly liable to be taken in execution under a writ of elegit: see the Judgments Act 1838 s 11 (repealed), which referred to the rents of the debtor; and see also *Wotton v Shirt* (1600) Cro Eliz 742. As to the abolition of the writ of elegit see SHERIFFS vol 42 (Reissue) PARA 1128.

10 See further CIVIL PROCEDURE. This remedy is now rarely used in practice: for a recent example see *Soinco SACI v Novokuznetsk Aluminium Plant* [1997] 3 All ER 523, [1998] 2 WLR 334.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(3) NATURE OF AN ANNUITY/762. Meaning of 'annuity'.

### **(3) NATURE OF AN ANNUITY**

#### **762. Meaning of 'annuity'.**

An annuity is a certain sum of money payable yearly either as the grantor's personal obligation or out of property not consisting exclusively of land; it differs from a rentcharge in that a rentcharge issues out of land<sup>1</sup>.

1 2 Bl Com (14th Edn) 40; Co Litt 144b; *Savery v Dyer* (1752) Amb 139 at 140; *Bignold v Giles* (1859) 4 Drew 343 at 346. In the Insurance Companies Act 1982, 'annuities on human life' does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment, or of the dependants of such persons: see s 96(1)

#### **UPDATE**

#### **762 Meaning of 'annuity'**

NOTE 1--Insurance Companies Act 1982 repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649. See now Financial Services and Markets Act 2000 and FINANCIAL SERVICES AND INSTITUTIONS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(3) NATURE OF AN ANNUITY/763. Nature of annuity.

#### **763. Nature of annuity.**

An annuity is itself personal estate<sup>1</sup>. Thus, annuities were held to be in the nature of personal estate when granted by the Crown out of Barbados duties<sup>2</sup>, or out of the revenues of the Post Office<sup>3</sup>, or out of coal duties<sup>4</sup>. Similarly, where, under statutory powers, limited owners granted easements and chattels to a company, subject to the payment of an annual rent or sum to the grantors, their executors, administrators and assigns, the interest was personal estate<sup>5</sup>. Where a will directs an annuity to be paid out of real and personal estate, the interest is personalty<sup>6</sup>.

1 Such an interest 'concerneth no land nor savoureth of the realtie': Co Litt 20a.

- 2     *Aubin v Daly* (1820) 4 B & Ald 59; *Earl of Stafford v Buckley* (1750) 2 Ves Sen 170.
- 3     *Countess Dowager of Holderness v Marquis of Carmarthen* (1784) 1 Bro CC 377.
- 4     *Radburn v Jervis* (1841) 3 Beav 450. Cf *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940 at 973 per Bray J.
- 5     *Re Baxter's Trusts, Malling v Addison* (1910) 103 LT 427; affd (1911) 104 LT 710, CA. Cf *Re Lord Gerard and Beecham's Contract* [1894] 3 Ch 295, CA. See also PARA 759 text and note 4 ante.
- 6     *Parsons v Parsons* (1869) LR 8 Eq 260; *Taylor v Martindale* (1841) 12 Sim 158; *Joynt v Richards* (1882) 11 LR Ir 278; *Re Trenchard, Trenchard v Trenchard* [1905] 1 Ch 82. A statutory charge of an annual sum on a statutory undertaking, comprising hereditaments corporeal and incorporeal and personalty, creates an interest which is personal, not real, estate: *Re Baxter's Trusts, Malling v Addison* (1910) 103 LT 427; affd (1911) 104 LT 710, CA.

## UPDATE

### 763 Nature of annuity

NOTES 2, 3--Land Registration Act 1925 replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(3) NATURE OF AN ANNUITY/764. Annuity as an item of property.

### 764. Annuity as an item of property.

An annuity, like a rentcharge, can be an item of property separate and distinct from the beneficial interests in it and from the funds and other property producing it. For the purpose of estate duty (now abolished), an annuity was capable of passing on a death and could be separately valued for that purpose<sup>1</sup>. In the case of inheritance tax, however, where a fixed annuity is charged on the income of settled property for any period, the annuitant is generally treated as having an interest in such part of that property as produces his annuity in that period<sup>2</sup>.

1     *Re Duke of Norfolk, Public Trustee v IRC* [1950] Ch 467, [1950] 1 All ER 664, CA. Estate duty was replaced by capital transfer tax, now known as inheritance tax (see the Finance Act 1986 s 100(1)(a)), in respect of deaths after 12 March 1975: see INHERITANCE TAXATION vol 24 (Reissue) PARA 401 et seq.

2     See the Inheritance Tax Act 1984 s 50(1)-(3); and INHERITANCE TAXATION vol 24 (Reissue) PARA 483.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(3) NATURE OF AN ANNUITY/765. Annuities as legacies.

### 765. Annuities as legacies.

The general rule is that annuities are included in the term 'legacies' in a will<sup>1</sup>, and even in the term 'pecuniary legacies'<sup>2</sup>, unless the will shows a contrary intention<sup>3</sup>. Similarly, 'legatee' may include an annuitant<sup>4</sup> unless the will indicates a contrary intention<sup>5</sup>. However, gifts by will of interests called annuities, accompanied by a charge on land, may, on construction, be held to

amount to gifts of rentcharges payable exclusively out of the land. That construction may be placed upon the gift if express powers of distress are given<sup>6</sup>, or where the annual sums are referred to as annuities or rentcharges<sup>7</sup>, or where the will contains other indications of intention that the gift is of a rentcharge<sup>8</sup>. However, that construction may render the gift void if the will was made after 22 August 1977<sup>9</sup>.

1 *Cornfield v Wyndham* (1845) 2 Coll 184 at 187; *Health v Weston* (1853) 3 De GM & G 601 at 606; *Mullins v Smith* (1860) 1 Drew & Sm 204; *Re Fitch's Will Trusts, Public Trustee v Nives* (1928) 139 LT 556, CA; *Re Thompson, Public Trustee v Husband* [1936] Ch 676 at 681, [1936] 2 All ER 141 at 142 per Clauson J.

2 *Gaskin v Rogers* (1866) LR 2 Eq 284 at 291.

3 *Shipperdson v Tower* (1842) 1 Y & C Ch Cas 441; *Cornfield v Wyndham* (1845) 2 Coll 184; *Ward v Grey* (1859) 26 Beav 485. Where a testator bequeathed to each of his executors 'the sum of £400 a year during the term of five years', these sums were held to be annuities payable out of income and not legacies payable out of capital but postponed in time of payment: *Scholefield v Redfern* (1863) 2 Drew & Sm 173.

4 See *Bromley v Wright* (1849) 7 Hare 334 at 340.

5 *Re Feather, Harrison v Tapel* [1945] Ch 343, [1945] 1 All ER 552.

6 *Taylor v Martindale* (1841) 12 Sim 158 at 16; *Shipperdson v Tower* (1842) 1 Y & C Ch Cas 441; *Sinnett v Herbert* (1871) LR 12 Eq 201 at 206; *Patching v Barnett* (1881) 51 LJ Ch 74, CA. Cf *Poole v Heron* (1873) 42 LJ Ch 348.

7 *Ion v Ashton* (1860) 28 Beav 379; *Buckley v Buckley* (1888) 19 LR Ir 544.

8 *Re Waring, Greer v Waring* [1896] 1 IR 427; *Lomax v Lomax* (1849) 12 Beav 285 at 290. Cf *Re Trenchard, Trenchard v Trenchard* [1905] 1 Ch 82, where the question was treated as one of construction.

9 See the Rentcharges Act 1977 s 2 (as amended), s 18(2); and PARA 774 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/1. NATURE OF RENTCHARGES AND ANNUITIES/(4) SATISFACTION/766. Satisfaction.

## (4) SATISFACTION

### 766. Satisfaction.

The doctrine of satisfaction, both as regards the satisfaction of portions by legacies and the satisfaction of debts by legacies<sup>1</sup>, has been considered by the courts in connection with annuities. Thus, where a father covenants by settlement to pay an annuity to his son and subsequently dies having bequeathed legacies to the son, this doctrine may prevent the son claiming both the annuity and the legacies<sup>2</sup>, but the will may show a contrary intention<sup>3</sup>. Again, where an annuity is granted or secured to another by a testator in his lifetime, and he subsequently dies having bequeathed to the grantee or obligee an annuity differing slightly from the existing annuity, these slight differences may prevent the doctrine of satisfaction from applying, so that both annuities may become payable<sup>4</sup>. Where the annuities are similar there is, according to the general rule, satisfaction<sup>5</sup>. The question whether bequests by testamentary dispositions of a testator are cumulative or substitutional is discussed subsequently<sup>6</sup>.

Annuities paid by a father to his daughters under a covenant in a separation deed have not on the father's death intestate been treated as advancements for the purposes of the former enactments<sup>7</sup> which required advances to a child of an intestate to be taken into account in determining the child's share in the intestate's estate<sup>8</sup>.

- 1 The rules are stated at length in EQUITY vol 16(2) (Reissue) PARA 739 et seq.
- 2 *Montagu v Earl of Sandwich* (1886) 32 ChD 525, CA; and see *Graham v Graham* (1749) 1 Ves Sen 262. As to oral evidence being admitted to rebut the presumption against double portions see EQUITY vol 16(2) (Reissue) PARA 750; WILLS vol 50 (2005 Reissue) PARA 485 et seq.
- 3 *Re Poyser* (1908) reported in a note to *Re Hall, Hope v Hall* [1918] 1 Ch 562 at 573, where specific sums to be brought into account were enumerated and the testator directed that no other advances should be accounted for.
- 4 *Hales v Darell* (1840) 3 Beav 324; *Re Dowse, Dowse v Glass* (1881) 50 LJ Ch 285; and see *Barret v Beckford* (1750) 1 Ves Sen 519; *Charlton v West* (1861) 30 Beav 124; *Paget v Grenfell* (1868) LR 6 Eq 7.
- 5 *Atkinson v Littlewood* (1874) LR 18 Eq 595; *Re Stibbe, Cleverley v Stibbe* (1946) 175 LT 198 (where presumption was rebutted); and see *Fowler v Fowler* (1735) 3 P Wms 353.
- 6 See PARA 807 post.
- 7 See the Administration of Estates Act 1925 s 47(1)(iii) (repealed in respect of intestates dying on or after 1 January 1996 by the Law Reform (Succession) Act 1995 s 1(2), Schedule); and EXECUTORS AND ADMINISTRATORS.
- 8 *Hatfeild v Minet* (1878) 8 ChD 136, CA, where only the value of the annuities at the intestate's death was taken into account: see EXECUTORS AND ADMINISTRATORS. Cf *Lord Kircudbright v Lady Kircudbright* (1802) 8 Ves 51 (bond by intestate to secure annuity to son; annuity no longer payable as son had failed to comply with condition of bond; son to bring into account value of annuity at date of grant or payments actually received, at his option).

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(1) IN GENERAL/767. Modes of creation.

## 2. CREATION, DURATION AND CHARGE

### The National Assembly for Wales and the Welsh Ministers; transfer of functions

As to the transfer of functions to the National Assembly for Wales and the Welsh Ministers, see the introductory note to this title.

## (1) IN GENERAL

### 767. Modes of creation.

At the present time there are three modes by which annuities and, to the limited extent now permitted<sup>1</sup>, rentcharges may be created, namely (1) by deed<sup>2</sup>; (2) by will<sup>3</sup>; (3) by or under statutory powers<sup>4</sup>.

In former times it was not uncommon for both rentcharges and perpetual annuities to be created by letters patent in exercise of the royal prerogative<sup>5</sup>.

- 1 See PARA 774 post.
- 2 See PARAS 777, 790 post.
- 3 See PARAS 784, 793 post.
- 4 See PARAS 786-789, 808-810 post. As to the registration of statutory charges as land charges see PARA 771 post.

<sup>5</sup> See eg *Countess Dowager of Holderness v Marquis of Carmarthen* (1784) 1 Bro CC 377; *Aubin v Daly* (1820) 4 B & Ald 59; *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940. As to royal grants by letters patent see generally CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 920 et seq.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(1) IN GENERAL/768. Effect of long continued payment.

### **768. Effect of long continued payment.**

The statutory provisions concerning the effect of the continued enjoyment of profits or benefits from land<sup>1</sup> do not apply to rentcharges<sup>2</sup> but, especially in favour of charities, the existence of a rentcharge may be established from long continued payment<sup>3</sup>. The courts will endeavour to find a legal origin for such payments and have on occasion presumed arrangements made long ago for payment of rent<sup>4</sup>. The long continued payment and legal origin must now, however, relate to a period or date prior to 22 August 1977, as from that date, with limited exceptions, the creation of new rentcharges is prohibited<sup>5</sup>.

<sup>1</sup> Ie the Prescription Act 1832: see EASEMENTS AND PROFITS A PRENDRE.

<sup>2</sup> See *ibid* s 1 (amended by the Statute Law Revision Act 1890).

<sup>3</sup> *A-G v West* (1858) 27 LJ Ch 789 (30 years' continuous payment); *A-G v Stephens* (1855) 6 De GM & G 111 at 138-139; *Foley's Charity Trustees v Dudley Corp'n* [1910] 1 KB 317, CA (fee farm rent paid for 100 years); and see CHARITIES vol 8 (2010) PARAS 110-112. For statutory provisions by which payment of a charitable rentcharge for 12 years is prima facie evidence of the perpetual liability of the land to that payment see CHARITIES vol 8 (2010) PARA 440.

<sup>4</sup> *Adnam v Earl of Sandwich* (1877) 2 QBD 485 (60 years' payment); *Bowen v Dillwyn-Venables-Llewelyn* (1958) 172 Estates Gazette 77, CA, where payment by a tenant of a farm of an annual sum, variously described over many years, was held referable to a rentcharge, presumed as the legal origin for the payment, with the consequence that the rentcharge was not barred by lapse of time as against the owner of the land. See also *Delarue v Church* (1851) 20 LJ Ch 183 (annuity).

<sup>5</sup> See the Rentcharges Act 1977 s 2 (as amended), s 18(2); and PARA 774 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(1) IN GENERAL/769. Priority.

### **769. Priority.**

The estate of a purchaser for value of a legal rentcharge has priority over any prior equitable interests in the land charged of which he had no notice when he obtained his legal estate<sup>1</sup>. As between equitable interests the prima facie rule is that they rank in order of date, unless there has been some act or omission on the part of an earlier owner which causes him to be postponed or, in certain cases, a failure on his part to register his interest<sup>2</sup>. In certain circumstances, but, as to equitable interests in land, only in the case of dealings effected after 1925<sup>3</sup>, priority can be obtained by giving written notice<sup>4</sup> to the trustees or owner of the land or other property affected<sup>5</sup>.

<sup>1</sup> See EQUITY vol 16(2) (Reissue) PARAS 570, 576 et seq. For the effect of the registration of a charge in constituting notice see, as regards rentcharges and annuities so registered, PARAS 770-771 post; and see generally EQUITY vol 16(2) (Reissue) PARA 583; LAND CHARGES. For the effect of the entry of a notice in the register in the case of registered land see EQUITY vol 16(2) (Reissue) PARA 577; LAND REGISTRATION. The system of

compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION. See also PARA 772 note 4 post.

2 See EQUITY vol 16(2) (Reissue) PARAS 568-569.

3 See CHOSSES IN ACTION vol 13 (2009) PARA 45; MORTGAGE vol 77 (2010) PARA 101 et seq.

4 Written notice is necessary in the case of an equitable interest in land: see CHOSSES IN ACTION vol 13 (2009) PARA 46. In other cases it may not be necessary that the notice should be in writing, but writing will probably be found expedient.

5 See CHOSSES IN ACTION vol 13 (2009) PARA 40 et seq.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(1) IN GENERAL/770. Registration as land charges of certain annuities or rentcharges.

### **770. Registration as land charges of certain annuities or rentcharges.**

Annuities or rentcharges granted after 25 April 1855, otherwise than by a marriage settlement or will, for a life or lives, or for a term of years or greater estate determinable on a life or lives, were formerly registrable in the register of annuities at the Land Registry and, unless so registered, did not affect any lands as to purchasers, mortgagees or creditors<sup>1</sup>. After 1925 no such annuity or rentcharge may be entered in the register of annuities, which is obsolescent, although existing entries remain until vacated<sup>2</sup>. Such annuities and rentcharges, if created before 1926, may now be registered as land charges of Class E<sup>3</sup>, and, unless registered as such, or before 1926 in the register of annuities, are void as against a purchaser or creditor of any interest in the land charged<sup>4</sup>. If created after 1925, such annuities or rentcharges, if they are equitable interests, may be registered as land charges of Class C(iii) as being general equitable charges<sup>5</sup>. Unless they are so registered, they are void against a purchaser of the land charged or any interest in it<sup>6</sup>.

Registration under these provisions is deemed to constitute actual notice to all persons and for all purposes connected with the land affected<sup>7</sup>, but a purchaser is not prejudicially affected by notice by other means of unregistered annuities or rentcharges which are capable of registration and are void against him by reason of non-registration<sup>8</sup>. Moreover, the registration of an equitable rentcharge or annuity does not prevent it from being overreached by a conveyance of the legal estate in land made by a tenant for life, trustees for sale, a mortgagee or a personal representative or made under an order of the court<sup>9</sup>.

1 Judgments Act 1855 ss 12, 14 (repealed); Land Charges Act 1900 s 1 (repealed). Annuitants were, however, held to be entitled to equitable priority over any purchaser or mortgagee having notice of their annuities and over the trustee in bankruptcy of the grantor, even though their annuities were not registered: *Greaves v Tofield* (1880) 14 ChD 563, CA. After this decision such annuities were seldom registered.

2 Land Charges Act 1972 s 1(4), Sch 1 paras 1, 3. See LAND CHARGES.

3 See *ibid* s 2(6); and LAND CHARGES.

4 See *ibid* Sch 1 para 4; and LAND CHARGES.

5 See *ibid* s 2(4)(iii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 12(1), (2)); and LAND CHARGES.

6 Land Charges Act 1972 Sch 1 para 4; and see LAND CHARGES.

7 Law of Property Act 1925 s 198(1) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1). This provision does not apply, however, where any question arises as to whether a purchaser under a contract for the sale or other disposition of an estate or interest in land, the title to which is not registered, made on or after 1 January 1970 had knowledge, at the time of entering into the contract, of a registered land charge, in which case the question must be determined by reference to the purchaser's actual knowledge: see the Law of Property Act 1969 s 24(1); and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES.

8 Law of Property Act 1925 s 199(1)(i); and see EQUITY vol 16(2) (Reissue) PARA 583; LAND CHARGES.

9 See further LAND CHARGES. See also EXECUTORS AND ADMINISTRATORS; REAL PROPERTY vol 39(2) (Reissue) PARAS 247-251; SETTLEMENTS. Although land which before 1 January 1997 was charged voluntarily, or in consideration of marriage, or by way of family arrangement, with a rentcharge for life or any less period or any annual sum for the benefit of any person became settled land (see the Settled Land Act 1925 s 1(1)(v)), the person having the powers of a tenant for life over the land might, and may still, sell it subject to the charge (see the Law of Property (Amendment) Act 1926 s 1). Subject to certain limited exceptions, no new settlement under the Settled Land Act 1925 can, however, be created since 31 December 1996: Trusts of Land and Appointment of Trustees Act 1996 s 2; and see s 2(6), Sch 1 para 3. See further REAL PROPERTY vol 39(2) (Reissue) PARAS 65, 204; SETTLEMENTS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(1) IN GENERAL/771. Registration of statutory charges as land charges.

### **771. Registration of statutory charges as land charges.**

A rentcharge or annuity<sup>1</sup> which is not a charge created by deed but is a charge upon land, other than a rate, may be registered as a land charge if created pursuant to the application of some person under the provisions of any Act for securing to any person either the money spent by him or the costs, charges and expenses incurred by him under that Act, or the money advanced by him for repaying the money spent or the costs, charges and expenses incurred by another person under the authority of an Act<sup>2</sup>. Such a rentcharge or annuity which is not a charge created by deed but is a charge upon land, other than a rate, created pursuant to the application of some person under specified enactments<sup>3</sup> may also be registered as a land charge<sup>4</sup>. Provision is made for the protection of purchasers against unregistered charges<sup>5</sup>.

1 In the Land Charges Act 1972, 'annuity' means a rentcharge or an annuity for a life or lives or for any term of years or greater estate determinable on a life or on lives and created after 25 April 1855 and before 1 January 1926, but does not include an annuity created by a marriage settlement or will: s 17(1).

2 See *ibid* s 2(1), (2)(a); and LAND CHARGES. See also Chancery Division Practice Direction No 13B set out in the Supreme Court Practice 1997 para 854. A land charge registered pursuant to the Land Charges Act 1972 s 2(2) is a Class A land charge and, if the charge was created pursuant to the application of some person, it is registrable as a land charge of Class A whenever it was created: s 2(2)(a). If a charge on land is created otherwise than pursuant to such an application, not being a local land charge, it is registrable as a land charge of Class B, but, if created before 1 January 1926, only if acquired under a conveyance made on or after that date: see s 2(3) (as amended), s 2(8); and LAND CHARGES.

3 I.e. the enactments mentioned in *ibid* Sch 2 (as amended): see LAND CHARGES.

4 See *ibid* s 2(2)(b); and LAND CHARGES.

5 See *ibid* s 4 (amended by the Finance Act 1975 s 52(1), Sch 12 paras 2, 18(1), (5); and the Inheritance Tax Act 1984 s 276, Sch 8 para 3(2)); and LAND CHARGES. The provisions previously mentioned (see PARA 770 text and notes 7-8 ante) with respect to the effect of registration as actual notice, and the ineffectiveness of notice by other means of unregistered charges, apply to statutory charges.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(1) IN GENERAL/772. Registration under the Land Registration Act 1925.

## **772. Registration under the Land Registration Act 1925.**

A rentcharge is included within the definition of 'land' for the purposes of the Land Registration Act 1925<sup>1</sup>. Accordingly, the owner of a rentcharge in possession issuing out of or charged on land, which is either perpetual<sup>2</sup> or for a term of years absolute, and which subsists as a legal estate<sup>3</sup>, may apply to have his title to the rentcharge registered under that Act<sup>4</sup>. Where a rentcharge in possession, either perpetual or for a term of years absolute, is granted out of registered land<sup>5</sup> by a disposition made otherwise than on a sale of the land, the disposition must be registered in order that the grantee may obtain a legal estate<sup>6</sup>. The title to an annuity or rentcharge which takes effect only in equity cannot be registered<sup>7</sup>; but an annuity or rentcharge which would have been capable of registration as a land charge under the Land Charges Act 1972 if the land affected had been unregistered<sup>8</sup> can normally be protected by being noted against the registered title to the land<sup>9</sup>.

1 See PARA 761 note 2 ante.

2 The use of the term 'perpetual' must now be understood as qualified by the statutory phasing-out of rentcharges: see the Rentcharges Act 1977 s 3; and PARA 894 post.

3 See PARA 754 ante. Estates capable of subsisting as legal estates are the only estates in respect of which a proprietor is capable of being registered under the Land Registration Act 1925: see s 2(1); and LAND REGISTRATION.

4 As to the registration of title see generally *ibid* ss 4-7 (s 4 amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 5(1), (3)); and LAND REGISTRATION. For special provisions applicable to the registration of rentcharges see the Land Registration Rules 1925, SR & O 1925/1093, rr 5(2), 50, 52 (amended by SI 1997/3037); and LAND REGISTRATION. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION. Nothing in ss 123, 123A (as so substituted and added), however, has the effect of requiring the registration of title to an incorporeal hereditament: see s 123(3)(a) (as so substituted). As to the incorporeal nature of a rentcharge see PARA 758 ante.

The Lord Chancellor may by order amend s 123 (as so substituted) so as to add to the dispositions in relation to which the requirement of compulsory registration applies any such disposition of, or otherwise affecting, a legal estate in unregistered land as is specified in the order (see s 123(4)(a) (as so substituted)); and s 123(3) (as so substituted) is expressed to be without prejudice to this power. At the date at which this volume states the law, no such order had been made. It is not entirely clear whether an order under s 123(4) (as so substituted) can require the compulsory registration of a rentcharge (an incorporeal hereditament) as that subsection appears only to empower the Lord Chancellor to add to the dispositions which call for compulsory registration; but if it cannot, the introductory words to s 123(3) (as so substituted) would seem to have no effect.

5 For the power of the proprietor of registered freehold or leasehold land to grant a rentcharge see *ibid* ss 18(1)(b), 21(1)(b); and LAND REGISTRATION. As to the form of grant see the Land Registration Rules 1925, SR & O 1925/1093, r 113. This power is now confined to the grant of rentcharges permitted by law: see the Rentcharges Act 1977 s 2 (as amended); and PARA 774 post.

6 See the Land Registration Act 1925 ss 18(5), 19(1), 20 (as amended), ss 21(5), 22(1), 23; and LAND REGISTRATION. Provision is made for the registration of notices or claims in respect of the grant or reservation of annuities or rentcharges in possession either perpetual or for a term of years absolute: see s 49(1)(a); and LAND REGISTRATION. Where land is sold in consideration of a rentcharge, the rentcharge is entered on the charges register as an incumbrance: Land Registration Rules 1925, SR & O 1925/1093, r 107; see LAND REGISTRATION.

7 See note 3 *supra*.



8 See PARA 770 ante. A land charge affecting registered land cannot normally be registered under the Land Charges Act 1972: see s 14 (amended by the Land Registration Act 1997 s 4(1), Sch 1 para 3); and LAND CHARGES. See also the Land Registration Act 1925 s 110(7); and LAND REGISTRATION.

9 See *ibid* ss 49(1)(c), 59(2); and LAND REGISTRATION. As to limitations on the use of notices see s 49(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 5(1), (5)); and LAND REGISTRATION. As to the effect of notices see the Land Registration Act 1925 ss 48(1), 49(1) (as so amended), s 52; and LAND REGISTRATION. See also EQUITY vol 16(2) (Reissue) PARA 577. As to the protection of a purchaser in respect of matters not entered on the register see LAND REGISTRATION.

## UPDATE

### 772 Registration under the Land Registration Act 1925

TEXT AND NOTES--Land Registration Act 1925 replaced by the Land Registration Act 2002; see LAND REGISTRATION.

NOTE 5--1925 Rules, SR & O 1925/1093, r 113 amended: SI 1999/1097.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(1) IN GENERAL/773. Stamp duty.

### 773. Stamp duty.

The stamp duty on the grant or conveyance of a rentcharge or annuity for valuable consideration is the same as that chargeable on a conveyance of land<sup>1</sup>. Contracts for the sale of certain property including any equitable estate or interest in a rentcharge may be charged with ad valorem duty as if they were actual conveyances on sale<sup>2</sup>. For the purposes of stamp duty the consideration is assessed in the manner specially prescribed where it consists of periodical payments<sup>3</sup> or where the conveyance is subject to a rentcharge<sup>4</sup>; and where there is a sale of an annuity not before in existence and secured only by bond the instrument is deemed to be a conveyance on sale<sup>5</sup>.

1 See the Stamp Act 1891 s 1, Sch 1, Conveyance or Transfer on Sale (as amended); and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1027 et seq.

2 See *ibid* s 59 (as amended); and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1041.

3 See *ibid* s 56; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1035.

4 See *ibid* s 57; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1046.

5 See *ibid* s 60; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1042.

## UPDATE

### 773 Stamp duty

TEXT AND NOTES 1, 2--Repealed: Finance Act 1999 Sch 19 para 1, Sch 20 Pt V(2).

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(2) CREATION OF RENTCHARGES/(i) Prohibition of New Rentcharges/774. Rentcharges prohibited.

## **(2) CREATION OF RENTCHARGES**

### **(i) Prohibition of New Rentcharges**

#### **774. Rentcharges prohibited.**

Subject to certain exceptions, no rentcharge<sup>1</sup> may be created, whether at law or in equity<sup>2</sup>, after 22 August 1977<sup>3</sup>, and any instrument<sup>4</sup> made after that date, to the extent that it purports to create such a rentcharge, is void<sup>5</sup>. The excepted rentcharges which may still be created are (1) a rentcharge for the life of a person or a shorter period which is charged on land which is held in trust for giving effect to the charge under the Trusts of Land and Appointment of Trustees Act 1996<sup>6</sup>; (2) a rentcharge which would have that effect but for the fact that the land on which the rent is charged is settled land or subject to a trust of land<sup>7</sup>; (3) a rentcharge which is an estate rentcharge<sup>8</sup>; (4) a rentcharge under any Act of Parliament providing for the creation of rentcharges in connection with the execution of works on land (whether by way of improvements, repairs or otherwise) or the commutation of any obligation to do any such work<sup>9</sup>; (5) a rentcharge by, or in accordance with the requirements of, a court order<sup>10</sup>.

The general prohibition on the creation of rentcharges did not prevent any such creation in pursuance of an agreement entered into before 22 July 1977<sup>11</sup>, or, in the case of land subject to compulsory purchase before that date, in pursuance of the statutory power of sale to the acquiring authority in consideration of a rentcharge<sup>12</sup>.

1 In the Rentcharges Act 1977, 'rentcharge' means any annual or other periodic sum charged on or issuing out of land, except (1) rent reserved by a lease or tenancy (s 1(a)); or (2) any sum payable by way of interest (s 1(b)). For the meaning of 'land' see PARA 761 note 1 ante.

2 As to rentcharges at law and in equity see PARA 754 ante.

3 Rentcharges Act 1977 ss 2(1), 18(2).

4 'Instrument', as applied to a writing, usually applies to a document under which some right or liability whether legal or equitable exists (see DEEDS AND OTHER INSTRUMENTS), and accordingly it is anticipated that the term includes wills as well as deeds.

5 Rentcharges Act 1977 s 2(2).

6 See *ibid* s 2(3)(a) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 15). Where by virtue of an instrument coming into operation after the commencement of the Trusts of Land and Appointment of Trustees Act 1996 (ie 1 January 1997), land becomes charged voluntarily (or in consideration of marriage) or by way of family arrangement, whether immediately or after an interval, with the payment of (1) a rentcharge for the life of a person or a shorter period; or (2) capital, annual or periodical sums for the benefit of a person, the instrument operates as a declaration that the land is held in trust for giving effect to the charge: s 2(6), Sch 1 para 3. For the meaning of 'settled land' see the Settled Land Act 1925 s 2 in conjunction with s 1 (as amended); and see SETTLEMENTS. Subject to certain exceptions, however, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65.

7 Rentcharges Act 1977 s 2(3)(b) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 15).

8 Rentcharges Act 1977 s 2(3)(c). For the meaning of 'estate rentcharge' see PARA 775 post.

9 *Ibid* s 2(3)(d). See eg the Improvement of Land Act 1864 s 51; and AGRICULTURAL LAND vol 1 (2008) PARA 632; the Settled Land Act 1925 s 85; and PARA 787 post; the Land Drainage Act 1991 s 34 (amended by the Environment Act 1995 s 120(1), Sch 22 para 191); and WATER AND WATERWAYS vol 101 (2009) PARA 592.

A conveyance under the right to buy provisions is made subject to a rentcharge (see the Housing Act 1985 s 139 (as amended), s 151 (as substituted), Sch 6 Pt IV para 21; and LANDLORD AND TENANT vol 27(3) (2006 Reissue)

PARA 1867); as is a conveyance executed for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (ss 1-38) (see s 34(6); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1647).

1 <sup>10</sup> Rentcharges Act 1977 s 2(3)(e).

11 Ibid s 17(3)(a).

12 Ibid s 17(3)(b). The statutory power referred to is that under the Compulsory Purchase Act 1965 s 24 (repealed), and, notwithstanding the repeal of s 24 by the Rentcharges Act 1977 s 17(2), Sch 2, in a case falling within s 17(3)(b) it will continue to have effect in relation to the creation of a rentcharge by virtue of s 17(3): s 17(3). A similar provision applies in respect of the repeal of the Leasehold Reform Act 1967 Sch 1 para 8, in that nothing in the repeal prevents the creation of a rentcharge under Sch 1 para 8 (repealed) in a case where written notice was duly given to the reversioner by the claimant under it before the coming into force of the repeal, and so that Sch 1 para 8 (repealed), notwithstanding the repeal, continues to have effect, subject to the provisions of the Rentcharges Act 1977, in relation to rentcharges created under it: s 17(6).

## UPDATE

### 774 Rentcharges prohibited

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(2) CREATION OF RENTCHARGES/(i) Prohibition of New Rentcharges/775. Meaning of 'estate rentcharge'.

### 775. Meaning of 'estate rentcharge'.

An estate rentcharge (which is one of the exceptions to the general prohibition effected by the Rentcharges Act 1977 on new rentcharges<sup>1</sup>) is a rentcharge<sup>2</sup> created for the purpose of (1) making covenants to be performed by the owner<sup>3</sup> of the land affected by the rentcharge enforceable by the rent owner<sup>4</sup> against the owner for the time being of the land<sup>5</sup>; or (2) meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land<sup>6</sup>. A rentcharge of more than a nominal amount is not treated as an estate rentcharge unless it represents a payment for the performance by the rent owner of any such covenant mentioned in head (2) above which is reasonable in relation to that covenant<sup>7</sup>.

1 See PARA 774 ante.

2 For the meaning of 'rentcharge' see PARA 774 note 1 ante.

3 'Owner', in relation to any land, means a person, other than a mortgagee not in possession, who is for the time being entitled to dispose of the fee simple of the land, whether in possession or in reversion, and includes a person holding or entitled to the rents and profits of the land under a lease or agreement: Rentcharges Act 1977 s 13(1). For the meaning of 'land' see PARA 761 note 1 ante.

4 'Rent owner', in relation to a rentcharge, means the person entitled to the rentcharge or empowered to dispose of it absolutely or to give an absolute discharge for the capital value of it: ibid s 13(1).

5 Ibid s 2(4)(a).

6 Ibid s 2(4)(b).

7 Ibid s 2(5).

## UPDATE

### 775 Meaning of 'estate rentcharge'

NOTE 6--See *Orchard Trading Estate Management Ltd v Johnson Security Ltd* [2002] EWCA Civ 406, [2002] 18 EG 155 (payment of rates was payment made for the benefit of land for the purposes of 1977 Act 2(4)(b)).

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(2) CREATION OF RENTCHARGES/(i) Prohibition of New Rentcharges/776. Implied covenants.

### 776. Implied covenants.

Where any land<sup>1</sup> affected by a rentcharge<sup>2</sup> created after 22 July 1977 by virtue of the exemptions relating to trusts in the case of family charges<sup>3</sup> is conveyed for consideration in money or money's worth, and remains affected by the rentcharge or by any part of it, then, in place of the usual statutory provisions in respect of covenants deemed to be included and implied in the conveyance<sup>4</sup>, the following provisions have effect<sup>5</sup>. In addition to the covenants for title implied by statute<sup>6</sup>, there are deemed to be included and implied in the conveyance covenants by the conveying party or joint and several covenants by the conveying parties (if more than one) with the grantee (or with each of the grantees) in the following terms<sup>7</sup>:

- 1 (1) that the conveying party will at all times after the date of the conveyance duly pay the rentcharge, or part of the rentcharge, and keep the grantee and those deriving title under him and their respective estates and effects indemnified against all claims and demands whatsoever in respect of the rentcharge<sup>8</sup>; and
- 2 (2) that the conveying party will, at his expense, in the event of the rentcharge, or part of the rentcharge, ceasing to affect the land conveyed, furnish evidence of that fact to the grantee and those deriving title under him<sup>9</sup>.

Any stipulation which is contained in an agreement and which is inconsistent with, or designed to prevent the operation of, these covenants, or any part of them, is void<sup>10</sup>.

1 For the meaning of 'land' see PARA 761 note 1 ante.

2 For the meaning of 'rentcharge' see PARA 774 note 1 ante.

3 I.e. by virtue of the Rentcharges Act 1977 s 2(3)(a) or (b) (as substituted): see PARA 774 ante.

4 I.e. the Law of Property Act 1925 s 77 (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 1; and the Landlord and Tenant (Covenants) Act 1995 ss 14(a), 30(1), (2), Schs 1, 2): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 575; SALE OF LAND. 'Conveyance' has the same meaning as in the Law of Property Act 1925 s 205(1) (see REAL PROPERTY vol 39(2) (Reissue) PARA 232 note 1): Rentcharges Act 1977 s 13(1).

5 Ibid s 11(1).

6 I.e. by the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) in relation to dispositions made on or after 1 July 1995 and by the Law of Property Act 1925 s 76 (repealed) in relation to dispositions made after 1925 and before 1 July 1995: see SALE OF LAND.

7 Rentcharges Act 1977 s 11(2) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 7). The benefit of the covenants deemed to be included and implied in a conveyance by these provisions is annexed and incident to and goes with the estate or interest of the implied covenantee and is capable of being enforced by every person in whom the estate or interest is from time to time vested: Rentcharges Act 1977 s 11(3). In effect, a purchaser of settled land or land held under a trust of land obtains under s 11 (as amended) an automatic indemnity from the vendor against any rentcharge affecting the land and imposed pursuant to s 2(3)(a) or (b) (as substituted).

8 Ibid s 11(2)(a).

9 Ibid s 11(2)(b).

10 Ibid s 11(4).

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## **(ii) Creation of Permitted Rentcharges**

### **A. CREATION BY DEED**

#### **777. Necessity for deed.**

To create<sup>1</sup> a rentcharge by an instrument inter vivos the instrument must be a deed, for a rentcharge is an incorporeal hereditament<sup>2</sup> and it is settled at common law that, whether for a freehold or a chattel interest, such a hereditament cannot be created otherwise than by deed<sup>3</sup>. The statutory requirement of a deed for the purpose of creating a legal estate is dealt with elsewhere in this work<sup>4</sup>. A rentcharge may be created by deed poll<sup>5</sup>.

An agreement for sufficient consideration to grant a rentcharge, issuing out of the grantor's land, which is evidenced by a writing not being a deed may be specifically enforced<sup>6</sup>. Such an agreement may entitle the grantee to have the rentcharge further secured by the grantor's personal covenant<sup>7</sup>. A lien on land for the purpose of securing a rentcharge may arise from a covenant<sup>8</sup>, or from a clause in a deed appointing a receiver<sup>9</sup>.

1 le so far only as not prohibited, as from 22 August 1977, by the Rentcharges Act 1977 s 2 (as amended): see PARA 774 ante.

2 3 Cru Dig 289 (28 Rents c 2 s 2); and see PARA 758 ante.

3 Co Litt 169a; *Hewlins v Shippam* (1826) 5 B & C 221 at 229; see also *Bird v Higginson* (1837) 6 Ad & El 824, Ex Ch; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 10. The requirement of a seal, in the case of a deed executed by an individual, was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended): see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 32. In the case of rentcharges created by deed before 1882, the deed usually provided express remedies for enforcing payment out of the land by distress, entry and the limitation of a term of years. Where the instrument came into operation after 31 December 1881, the owner of a rentcharge can now by statute enforce payment by distress, entry or a demise for a term: see the Law of Property Act 1925 s 121 (as amended); and PARA 865 et seq post. A rentcharge is also frequently secured by the personal covenant of the creator, and sometimes special powers are given for the appointment of a receiver: see PARAS 880-882 post.

4 See ibid s 52 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 14, 15.

5 Littleton's Tenures s 218; Gilbert on Rents 38; *Grenon v Rawson* (1726) Cas temp King 57; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 3.

6 *Jackson v Lever* (1792) 3 Bro CC 605; *Coles v Trecothick* (1804) 9 Ves 234 at 246; *Wellesley v Wellesley* (1839) 4 My & Cr 561 at 579. See also *Lord Carbery v Weston* (1757) 1 Bro Parl Cas 429, HL; *Pope v Roots* (1774) 1 Bro Parl Cas 370, HL; *Mortimer v Capper* (1782) 1 Bro CC 156; *Kenney v Wexham* (1822) 6 Madd 355.

7 *Bower v Cooper* (1843) 2 Hare 408.

8 *Wellesley v Wellesley* (1839) 4 My & Cr 561 at 579; *White v Anderson* (1850) 11 Ch R 419; *Montagu v Earl of Sandwich* (1886) 32 ChD 525, CA. See also *Watson v Sadleir* (1829) 1 Mol 585; *Countess of Mornington v Keane* (1858) 2 De G & J 292. Cf *Dixon v Gayfere* (1857) 1 De G & J 655, and LIEN vol 68 (2008) PARA 855 et seq.

9 *Cradock v Scottish Provident Institution* [1893] WN 146; affd [1894] WN 88, CA.

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### **778. Estates in fee simple or for terms of years.**

At law a rentcharge in possession may be created<sup>1</sup> for an estate in fee simple or for a term of years by common law grant or reservation<sup>2</sup> and, although often desirable, execution by the grantee of the deed reserving a rentcharge is no longer essential<sup>3</sup>. Any other estate or interest in a rentcharge can only be created and take effect as an equitable interest<sup>4</sup>.

1 It is so far only as not prohibited, as from 22 August 1977, by the Rentcharges Act 1977 s 2 (as amended): see PARA 774 ante.

2 Co Litt 144a; 3 Cru Dig 289 (28 Rents c 2 ss 1, 3). Such a rentcharge is the only rentcharge which can subsist at law: see PARA 754 ante. Words of limitation seem not to be required for the creation of a perpetual rentcharge inter vivos: see the Law of Property Act 1925 s 60 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 10; SALE OF LAND. It appears that even before 1926 words of inheritance were not essential if the intention to create a perpetual rentcharge was clear: *Grant v Edmondson* [1930] 2 Ch 245 at 254; affd [1931] 1 Ch 1, CA. For an instance of a rentcharge issuing out of a term of years see *Re Fraser, Lowther v Fraser* [1904] 1 Ch 111; affd [1904] 1 Ch 726, CA.

3 See the Law of Property Act 1925 s 65; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 239. Where a rentcharge was created by common law reservation there was in effect a grant of the land followed by a grant of the rentcharge to the grantor of the land by the purchaser of the land: *Browning v Beston* (1555) 1 Plowd 131. Cf *Ewart v Graham* (1859) 7 HL Cas 331 at 345. Before 1926 such a conveyance had to be executed by the grantee of the land: *Gilbertson v Richards* (1859) 4 H & N 277 at 295. See also *Ingram v IRC* [1997] 4 All ER 395, CA.

4 See PARA 754 ante.

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### **779. Equitable interests in rentcharges.**

After 1925 a rentcharge for life, pur autre vie or in tail<sup>1</sup> could only be created by way of trust and would take effect as an equitable interest usually subject to a settlement of land<sup>2</sup>. Subject to certain exceptions, it has not since 1996 been possible to create a new strict settlement<sup>3</sup>, though existing settlements continue<sup>4</sup>, nor has it been possible to create an entailed interest by any means since that date<sup>5</sup>. Where, however, by virtue of an instrument coming into operation after 31 December 1996 land under a family charge is charged with the payment of a

rentcharge for the life of a person or a shorter period, the instrument operates as a declaration that the land is held in trust for giving effect to the charge<sup>6</sup>. Such a rentcharge is destined to survive the general prohibition as to the creation of new rentcharges<sup>7</sup>. As a rentcharge is land<sup>8</sup>, it can itself be made the subject of a trust of land by which successive equitable interests are created; but in practice this is very uncommon.

1 As to the expressions which could previously create an estate tail see PARA 812 post. It has been held that if a newly created rentcharge was granted for an equitable estate tail without any limitation over in fee the tenant in tail on disentailing acquired only a base fee: *Pinkerton v Pratt* [1915] 1 IR 406, following dicta in *Chaplin v Chaplin* (1733) 3 P Wms 229 at 230. But cf *Re Frank's Estate* [1915] 1 IR 387, 1r CA, where the legal estate in the rentcharge was vested in a trustee in fee simple and the tenant in tail on disentailing was held to acquire an equitable fee simple. As to base fees see generally REAL PROPERTY vol 39(2) (Reissue) PARAS 134-139.

2 See the Settled Land Act 1925 s 1(1)(v); and see PARA 774 note 6 ante; and SETTLEMENTS. As to equitable interests see generally EQUITY vol 16(2) (Reissue) PARA 601 et seq.

3 I.e. one under the Settled Land Act 1925: see generally SETTLEMENTS.

4 See the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65.

5 See *ibid* s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARAS 105, 119.

6 See *ibid* s 2, Sch 1 para 3; and PARA 774 ante.

7 See the Rentcharges Act 1977 s 2(3)(a), (b) (as substituted); and PARA 774 ante.

8 See PARA 761 ante.

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## **780. Sales of land in consideration of rentcharge.**

Freehold land was often sold in consideration of a perpetual rentcharge, especially in the North and West of England. However, by reason of the statutory prohibition on the creation of new rentcharges, with limited exceptions, as from 22 August 1977<sup>1</sup>, this practice has ceased<sup>2</sup>.

1 See the Rentcharges Act 1977 s 2 (as amended); and PARA 774 ante. In consequence of the prohibition of new rentcharges the following provisions relating to sale in consideration of a rentcharge and similar powers have been repealed by s 17(2), Sch 2: the Lands Clauses Consolidation Act 1845 s 10, both as originally enacted and as incorporated in any Act or instrument; the Inclosure Act 1857 ss 6-9; the Land Settlement (Facilities) Act 1919 ss 7, 9(1)-(4); the Compulsory Purchase Act 1965 s 24; the Leasehold Reform Act 1967 Sch 1 para 8. See, however, PARA 774 note 12 ante.

2 Similar systems may be achieved, however, by the use of long leases.

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## **781. Estate out of which rentcharge may be created.**

A legal rentcharge may be created<sup>1</sup> out of an estate in fee simple<sup>2</sup>, or a term of years<sup>3</sup>, but in the latter case the rentcharge is a chattel real<sup>4</sup>. The effect of the charging of a rentcharge on both freeholds and leaseholds has been previously mentioned<sup>5</sup>.

1 He so far only as not prohibited, as from 22 August 1977, by the Rentcharges Act 1977 s 2 (as amended): see PARA 774 ante.

2 This is usually the estate out of which a rentcharge is granted: see PARA 778 ante. As to the creation of a rentcharge out of another rentcharge see PARA 759 ante.

3 Co Litt 147b; *Mounson v Redshaw* (1668) 1 Wms Saund 186e; *Butt's Case* (1600) 7 Co Rep 23a; *Re Fraser, Lowther v Fraser* [1904] 1 Ch 111; affd [1904] 1 Ch 726, CA. Where, however, a leaseholder sells his interest in consideration of a rent, in practice he will usually grant an underlease for the remainder of his term less a few days and not create a rentcharge: see *Report on Rentcharges* (Law Com no 68) PARA 11 note 7.

4 *Re Fraser, Lowther v Fraser* [1904] 1 Ch 111; affd [1904] 1 Ch 726, CA; Co Litt 147b. See also *Butt's Case* (1600) 7 Co Rep 23a; *Saffery v Elgood* (1834) 1 Ad & El 191; *Re Ramadge's Settlement, Hamilton v Ramadge* [1919] 1 IR 205; and PARA 758 ante. The remedies for recovery of a rentcharge charged on land, conferred by the Law of Property Act 1925 s 121 (as amended), appear to apply, as 'land' in that Act includes land of any tenure: s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and see *Re Kershaw, Drake v Kershaw* (1888) 37 ChD 674 at 677. As to those remedies see PARA 865 post.

5 See PARA 758 ante.

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## **782. Merger of rentcharge.**

If a person grants a perpetual rentcharge issuing out of his land and then conveys his land in fee simple to the owner of the rentcharge, the rentcharge will normally then determine<sup>1</sup>.

1 *Freeman v Edwards* (1848) 2 Exch 732 at 739. See further PARA 895 post. Under the law before 1926 a mortgage of copyholds by covenant to surrender with power to distrain for the interest operated as a rentcharge which ceased on admittance: *Freeman v Edwards* supra. As to copyhold enfranchisement see REAL PROPERTY VOL 39(2) (Reissue) PARA 31 et seq.

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## **783. Extent of grantor's estate.**

The grantor of a rentcharge must have an estate or interest in the land out of which the rentcharge is to issue at least as great as the estate to be granted in the rentcharge<sup>1</sup>. A limited owner of settled land, even though his beneficial interest may be for life only, has the legal estate in fee simple in the land which he holds in the character of trustee<sup>2</sup> and accordingly he can either grant or reserve a rentcharge in fee simple out of that land; and, in the case of a conveyance of the settled land in consideration of a rentcharge, the transaction takes effect as a grant of the rentcharge by the limited owner as such a trustee in fee simple of the land<sup>3</sup>, and the conveyance operates to vest the rentcharge in the limited owner and becomes a subsidiary vesting deed<sup>4</sup>.



1 *Doe d Garrod v Olley* (1840) 12 Ad & El 481 at 487; *Freeman v Edwards* (1848) 2 Exch 732; *Jolly v Arbuthnot* (1859) 4 De G & J 224 at 241. The duration of a rentcharge cannot exceed that of the estate out of which it is granted: see PARA 812 post.

2 See the Settled Land Act 1925 ss 4(2), 6(b), 7(1)-(4), 9(2), 20(1), 107 (s 20(1) amended by the Married Women (Restraint upon Anticipation) Act 1949 s 1(4), Sch 2; and the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 2(8)); and SETTLEMENTS. Subject to certain exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 s 2 on 1 January 1997: see REAL PROPERTY vol 39(2) (Reissue) PARA 65.

3 As to the power of a limited owner of settled land to execute such a conveyance see PARAS 777 ante, 787 post.

4 See the Settled Land Act 1925 ss 10, 72; and SETTLEMENTS. Cf *Ewart v Graham* (1859) 7 HL Cas 331 at 345; *Durham and Sutherland Rly Co v Walker* (1842) 2 QB 940 at 967, Ex Ch.

As to the powers of trustees of land see PARA 788 post.

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## **B. CREATION BY WILL**

### **784. Creation of rentcharge by will.**

An interest in the nature of a rentcharge may be created<sup>1</sup> by will<sup>2</sup>, for which purpose it is unnecessary to use any particular form of words<sup>3</sup>. The question whether a rentcharge is created by a will is one of construction, and the indication of the testator's intention to create an interest having the incidents of a legal rentcharge is sufficient<sup>4</sup>. Thus, a rentcharge is created where a testator devises land to one person charged with the payment of an annual sum to another<sup>5</sup>. A gift by will of a rentcharge issuing out of land is a gift of an interest in the land itself and necessarily specific<sup>6</sup>. Since 1925, a will operates only in equity<sup>7</sup> and an assent or conveyance by the personal representative of the testator is necessary in order to vest the rentcharge in the devisee<sup>8</sup>.

On construction, a rentcharge charged on the testator's real estate may, as being a specific gift, have priority over legacies directed to be raised out of real estate in the event of the personal estate proving insufficient<sup>9</sup>.

1 It is so far only as not prohibited, as from 22 August 1977, by the Rentcharges Act 1977 s 2 (as amended): see PARA 774 ante.

2 See eg *Ramsay v Thorngate* (1849) 16 Sim 575; *Gully v Davis* (1870) LR 10 Eq 562. Where before 1926 a testator who was only entitled to an undivided share in land purported by will to give a rentcharge payable out of the whole of the land, the rentcharge was payable in full out of the testator's share: *Roche v Jordan* [1896] 1 IR 494. An undivided share in land can no longer exist at law: see REAL PROPERTY vol 39(2) (Reissue) PARA 55.

3 The duration of the rentcharge depends on the terms of the grant: see PARA 812 post.

4 See *Ramsay v Thorngate* (1849) 16 Sim 575; *Lomax v Lomax* (1849) 12 Beav 285 at 290; *Ion v Ashton* (1860) 28 Beav 379; *Sinnett v Herbert* (1871) LR 12 Eq 201; *Patching v Barnett* (1881) 51 LJ Ch 74, CA; *Re Waring*, *Greer v Waring* [1896] 1 IR 427; *Re Trenchard*, *Trenchard v Trenchard* [1905] 1 Ch 82, where the authorities were considered and, on construction, the particular gift was held to be a personal annuity and not a rentcharge; *Re Spencer*, *Cooper*, *Poë v Spencer* [1908] 1 Ch 130, where there was a charge on a mixed fund.

5 *Sollory v Leaver* (1869) LR 9 Eq 22; *Buttery v Robinson* (1826) 3 Bing 392. Such a devise would, before 1997, normally have created a settlement of the land (see the Settled Land Act 1925 s 1(1)(v); and SETTLEMENTS). Subject to certain exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 s 2 on 1 January 1997: see REAL PROPERTY vol 39(2) (Reissue) PARA 65. Such a devise would now operate as a declaration that the land is held in trust for giving effect to the charge (see s 2(6), Sch 1 para 3; and PARA 774 note 6 ante), and would be excepted from the general prohibition against the creation of new rentcharges (see PARA 774 ante). For instances where trustees took the legal estate under a devise of land to them upon trust to pay out of it an annual sum see *Fenwick v Potts* (1856) 8 De GM & G 506; *Doe d White v Simpson* (1804) 5 East 162; and see *Adams v Adams* (1845) 6 QB 860.

6 *Creed v Creed* (1844) 11 Cl & Fin 491 at 508, 510, HL; *Pitt v Lord Dacre* (1876) 3 ChD 295 at 299.

7 See the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 3, by virtue of which the Wills Act 1837 takes effect to enable equitable interests to be disposed of subject to the estate and powers of the personal representative; and see WILLS vol 50 (2005 Reissue) PARAS 315, 328. As to the devolution of real estate on the personal representative see the Administration of Estates Act 1925 s 1; and EXECUTORS AND ADMINISTRATORS.

8 See *ibid* s 36 (as amended); and EXECUTORS AND ADMINISTRATORS.

9 *Creed v Creed* (1844) 11 Cl & Fin 491 at 506, HL; *Weir v Chamley* (1850) 1 I Ch R 295; *Re Briggs, Briggs v George* (1881) 45 LT 249. See *Earl of Portarlington v Damer* (1863) 4 De GJ & Sm 161; *Bell v Bell* (1872) IR 6 Eq 239. Cf *Roper v Roper* (1876) 3 ChD 714, where legacies and annuities were charged on a testator's real estate, and a power of distress given in respect of the latter was held, on the construction of the will, not to create any priority.

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### **785. Construction of power to appoint jointure.**

In special cases, a power given by a will to a tenant for life to appoint a rentcharge to his wife by way of jointure could authorise the appointment of a rentcharge commencing in the lifetime of the husband<sup>1</sup>; but *prima facie* such a power referred to a jointure commencing on his death<sup>2</sup>.

The question is very unlikely to arise in the future for, subject to certain exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force on 1 January 1997 of the Trusts of Land and Appointment of Trustees Act 1996<sup>3</sup>.

1 *Jamieson v Trevelyan* (1854) 10 Exch 269.

2 *Re De Hoghton, De Hoghton v De Hoghton* [1896] 2 Ch 385; *Greenwood v Lutman* [1915] 1 IR 266. Rentcharges for life now take effect as equitable interests: see PARAS 754, 779 ante. As to jointures see generally SETTLEMENTS.

3 See the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65.

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## **C. CREATION UNDER STATUTORY POWERS**

### **786. In general.**

Numerous statutory provisions as to the creation of rentcharges did not survive the statutory prohibition of the creation of rentcharges on and after 22 August 1977<sup>1</sup>. However, the creation of rentcharges in connection with the execution of works on land, whether by way of improvements, repairs or otherwise, or the commutation of any obligation to do any such work was excepted from the general prohibition<sup>2</sup>. Thus, powers continue for the creation of rentcharges for the commutation of an obligation imposed on any person by reason of tenure, custom, prescription or otherwise to do any work in connection with the drainage of land<sup>3</sup>, and for the creation of rentcharges under the Improvement of Land Act 1864<sup>4</sup> and under other Acts authorising the charging of land with the expenses of improvement<sup>5</sup>.

Local authorities have powers under the housing legislation of granting orders charging annual sums on premises on which works have been executed in favour of the persons who paid for the works<sup>6</sup>.

1 As to the prohibition of new rentcharges see PARA 774 ante. For the repealed provisions see PARA 780 note 1 ante.

2 See the Rentcharges Act 1977 s 2(3)(d); and PARA 774 ante.

3 See under the Land Drainage Act 1991 s 34 (as amended): see WATER AND WATERWAYS vol 101 (2009) PARA 592.

4 See under the Improvement of Land Act 1864 s 51: see AGRICULTURAL LAND vol 1 (2008) PARA 632.

5 See eg the Agricultural Holdings Act 1986 ss 85, 87; and AGRICULTURAL LAND vol 1 (2008) PARA 474 et seq; the Landlord and Tenant Act 1927 s 12, Sch 1 (as amended); and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 801.

6 See PARA 809 post.

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## **787. The Settled Land Act 1925.**

A tenant for life of settled land may grant the land in perpetuity at a perpetual rent or at a terminable rent consisting of principal and interest combined<sup>1</sup>. The conveyance must contain a covenant for payment of the rent and a duplicate must be executed by the purchaser and handed to the tenant for life or statutory owner, and the statutory powers<sup>2</sup> for recovery of the rentcharge apply<sup>3</sup>. This power is not, however, saved from the general statutory prohibition on the creation of rentcharges on and after 22 August 1977, and accordingly will now be confined to the exceptions permitted by statute<sup>4</sup>.

On the other hand the power of the tenant for life to create out of the settled land in favour of the trustees of the settlement a yearly rentcharge sufficient to discharge by not more than 50 half-yearly instalments capital money spent on certain improvements<sup>5</sup> is saved from the general statutory prohibition<sup>6</sup>. There is a similar saving where the court authorises capital money to be applied in payment of such improvements, and to be repaid by instalments, the settled land being charged with the payment to the trustees of the settlement of a yearly rentcharge sufficient to discharge those instalments<sup>7</sup>. In that case the trustees of the settlement have all the statutory powers<sup>8</sup> for the recovery of rentcharges<sup>9</sup>, and the rentcharge may be overreached by a sale in like manner as if it had been limited by the settlement, and ceases when the land ceases to be settled land or is sold or exchanged<sup>10</sup>. If the tenant for life has a protected life interest and creates such a rentcharge, it does not cause a forfeiture even

though some of the improvements for payment of which it was granted may be outside those authorised by statute<sup>11</sup>.

Subject to certain exceptions, however, it has not been possible to create a new strict settlement<sup>12</sup> since 31 December 1996, but settlements then existing continue<sup>13</sup>.

1 See the Settled Land Act 1925 s 39(2); and SETTLEMENTS.

2 See the Law of Property Act 1925 s 121 (as amended); and PARA 863 et seq post.

3 Settled Land Act 1925 s 39(4)(i), (ii) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule). The conveyance becomes a subsidiary vesting deed: see the Settled Land Act 1925 s 10(1), (3); and SETTLEMENTS.

4 See the Rentcharges Act 1977 s 2 (as amended); and PARA 774 ante.

5 See the power under the Settled Land Act 1925 ss 84(2) proviso (a), 85(1). The improvements referred to are those not authorised by s 83, Sch 3 Pt I: s 84(2) proviso (a). As to the authorised improvements see AGRICULTURAL LAND vol 1 (2008) PARA 615; and see further SETTLEMENTS.

6 See the Rentcharges Act 1977 s 2(3)(d); and PARA 774 ante.

7 See the Settled Land Act 1925 ss 84(4), 85(2); and SETTLEMENTS.

8 See note 2 supra.

9 See the Settled Land Act 1925 s 85(2).

10 Ibid s 85(3). As to the overreaching effect of a conveyance under the Settled Land Act 1925 see s 72(2), (3); and REAL PROPERTY vol 39(2) (Reissue) PARA 248; SETTLEMENTS. See also PARA 770 text and note 9 ante.

11 *Re Liberty's Will Trusts, Blackmore v Liberty* [1937] Ch 176, [1937] 1 All ER 399.

12 See a settlement under the Settled Land Act 1925: see generally SETTLEMENTS.

13 See the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65.

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## **788. The Trusts of Land and Appointment of Trustees Act 1996.**

For the purpose of exercising their functions as trustees, trustees of land<sup>1</sup> have in relation to the land subject to the trust all the powers of an absolute owner<sup>2</sup>. They are subject to the general statutory prohibition on the creation of rentcharges on and after 22 August 1977<sup>3</sup>, and have the benefit of the exceptions permitted by statute<sup>4</sup>.

1 For the meaning of 'trustees of land' see REAL PROPERTY vol 39(2) (Reissue) PARA 66 note 7.

2 See the Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 241; TRUSTS vol 48 (2007 Reissue) PARA 1035. As to the trustees' powers of delegation to beneficiaries see s 9(1); and TRUSTS vol 48 (2007 Reissue) PARA 987.

3 Rentcharges Act 1977 s 2(1).

4 See *ibid* s 2(3)-(5) (as amended); and PARAS 774-775 ante.

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### **789. The Land Registration Act 1925.**

A registered proprietor of freehold land may grant an annuity or rentcharge<sup>1</sup> in possession either perpetual or for a term of years absolute<sup>2</sup>. In such a case the statutory remedies for the recovery of rentcharges apply, except in so far as varied by the disposition creating the rentcharge<sup>3</sup>. The registered proprietor of leasehold land may, to the extent of the registered estate, grant an annuity or rentcharge in possession<sup>4</sup>.

1    In so far only as not prohibited, as from 22 August 1977, by the Rentcharges Act 1977 s 2 (as amended): see PARA 774 ante.

2    See the Land Registration Act 1925 s 18(1)(b); and LAND REGISTRATION.

3    See *ibid* s 18(2); and LAND REGISTRATION. For the statutory remedies see the Law of Property Act 1925 s 121 (as amended); and PARA 863 et seq post.

4    See the Land Registration Act 1925 s 21(1)(b); and LAND REGISTRATION. As to the necessity for the registration of the disposition see PARA 772 ante.

### **UPDATE**

### **789 The Land Registration Act 1925**

TEXT AND NOTES--Land Registration Act 1925 replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(i) Creation by Deed or other Instrument inter vivos/790. By deed.

## **(3) CREATION OF ANNUITIES**

### **(i) Creation by Deed or other Instrument inter vivos**

#### **790. By deed.**

To create an annuity by instrument inter vivos, as a general rule a deed is necessary<sup>1</sup>. An annuity is frequently secured by a personal covenant<sup>2</sup>.

Annuities created under contracts of retirement insurance are considered elsewhere in this work<sup>3</sup>.

1    *Re Locke* (1823) 2 Dow & Ry KB 603 at 606; see also *Cupit v Jackson* (1824) 13 Price 721, Ex Ch; and see DEEDS AND OTHER INSTRUMENTS. As to the necessity for a deed for the conveyance of a legal estate in land see the Law of Property Act 1925 s 52(1); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14. The grant of life annuities by deed was largely in vogue during the seventeenth, eighteenth and the early part of the

nineteenth centuries as a means of raising money and evading the usury laws. The usury laws, which prohibited loans at a higher rate of interest than 5%, were repealed by the Usury Laws Repeal Act 1854.

2 Where a life annuity is secured by a personal covenant, the covenantor cannot on originating summons obtain a declaration as to the evidence to be produced of the continuance of the annuitant's life: *Hunt v Hunt* (1907) 97 LT 822, CA. As to bonds to secure annuities see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 89 et seq; and as to the stamp duty on such bonds see PARA 773 ante; STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1042; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 104.

3 See SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 677 et seq.

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### 791. Specific performance.

Although a deed may be necessary for the express grant of an annuity, an agreement for valuable consideration for the grant of an annuity is an agreement of which the courts may decree specific performance<sup>1</sup>.

1 *Pritchard v Ovey* (1820) 1 Jac & W 396; *Swift v Swift* (1841) 3 I Eq R 267; *Keenan v Handley* (1864) 2 De GJ & Sm 283; and see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 834. A written memorandum of such an agreement is not required: see the Law Reform (Enforcement of Contracts) Act 1954 s 1 (repealed), amending the Statute of Frauds (1677) s 4.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(i) Creation by Deed or other Instrument inter vivos/792. Variation of settlements.

### 792. Variation of settlements.

The grant or purchase of an annuity by one spouse for the benefit of the other is normally a settlement within the statutory power<sup>1</sup> of the court to make orders varying any ante-nuptial or post-nuptial settlement on or after granting a decree of divorce or of nullity of marriage or a decree of judicial separation<sup>2</sup>.

1 Ie under the Matrimonial Causes Act 1973 s 24(1)(c), (d): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 510. The Matrimonial Causes Act 1973 Pt II (ss 21-40) (as amended) is extensively amended, and s 24 is substituted, by the Family Law Act 1996 s 15, Sch 2, as from a day to be appointed under s 67(3).

2 See *Bosworthick v Bosworthick* [1927] P 64, CA. In *Brown v Brown* [1937] P 7, [1936] 2 All ER 1616, the purchase by a wife from an insurance company of an annuity for her husband was held an absolute gift and not a 'settlement'. This case appears, however, to be contrary to the modern current of authority and would probably not be followed today: see *Prescott (formerly Fellowes) v Fellowes* [1958] P 260 at 279, [1958] 3 All ER 55 at 61, CA; and see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 510. As from a date to be appointed under the Family Law Act 1996 s 67(3), decrees for divorce and judicial separation are replaced by divorce and separation orders: see s 2.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/793. Creation by will of annuities.

## (ii) Creation by Will

### 793. Creation by will of annuities.

Annuities can be created by will; and in a will, according to the general rule, annuities are included in the term 'legacies'<sup>1</sup>. The most common form of annuities created by will are life annuities; but a will may create annuities for different periods, or annuities which are perpetual<sup>2</sup>.

1 See PARA 765 ante.

2 See PARA 813 et seq post. As to wills generally see WILLS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/794. Acceleration by failure of prior gift.

### 794. Acceleration by failure of prior gift.

Where a testator gave annuities subject to a life interest and the tenant for life disclaimed, the annuities were held to have been accelerated and took effect from the testator's death<sup>1</sup>.

1 *Re Hodge, Midland Bank Executor and Trustee Co Ltd v Morrison* [1943] Ch 300, [1943] 2 All ER 304. As to the acceleration of subsequent interests on the failure of prior interests see eg *Jull v Jacobs* (1876) 3 ChD 703; and see generally WILLS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/795. Forms of gift of life annuity.

### 795. Forms of gift of life annuity.

The creation by will of a life annuity may take any one of the following forms: (1) a simple bequest of an annuity<sup>1</sup>; (2) a simple bequest, followed by a direction to the trustees of the will to set apart a fund to provide for the annuity, or a power to do so<sup>2</sup>; (3) a simple bequest of an annuity, followed by a power to the trustees to purchase an annuity<sup>3</sup>; (4) a simple bequest of an annuity followed by a direction to the trustees to purchase an annuity, or a direction to purchase standing alone<sup>4</sup>; or (5) a direction to trustees to invest a given sum in the purchase of an annuity for the annuitant's benefit<sup>5</sup>.

1 See PARA 796 post.

2 See PARA 797 post.

3 See PARA 800 post.

4 See PARA 801 post.

5 See PARA 802 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/796. Simple bequest of annuity.

### **796. Simple bequest of annuity.**

In the case of a simple bequest of a life annuity, where the testator's estate is sufficient, the annuitant may not claim to be paid in cash the value of the annuity<sup>1</sup>; but he may claim to have such a security set apart as will make it practically certain that the annuity will be paid<sup>2</sup>. Where the estate is insufficient, the annuitant may claim that the annuity should be valued, and that the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies, should be paid to him in cash<sup>3</sup>. Where the will shows an intention that recourse is to be had to capital to pay annuities in full, income being insufficient for the purpose, effect is given to the intention<sup>4</sup>.

1 *Re Ross, Ashton v Ross* [1900] 1 Ch 162 at 165.

2 *Harbin v Masterman* [1896] 1 Ch 351 at 355, CA; and see EXECUTORS AND ADMINISTRATORS.

3 *Wroughton v Colquhoun* (1847) 1 De G & Sm 357; *Re Ross, Ashton v Ross* [1900] 1 Ch 162; *Franks v Cooper* [1799] 4 Ves 763; and see EXECUTORS AND ADMINISTRATORS. As to the application of this rule where the annuity is limited to a person for life or until he does something whereby the same, if belonging to him absolutely, would become vested in some other person, see PARA 797 text and note 5 post.

4 *Re De Chassiron, Lloyds Bank Ltd v Sharpe* [1939] Ch 934, [1939] 3 All ER 321.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/797. Direction or power to set apart fund.

### **797. Direction or power to set apart fund.**

Where a bequest of a life annuity is followed by a direction or power to set apart a fund to provide for it and the estate is sufficient to set apart the requisite fund, then although the annuitant may be entitled to have any deficiency of income made up out of capital, he may not claim to have the value of the annuity paid over to him<sup>1</sup>. Where the estate is insufficient to set apart the requisite fund and also to pay in full any pecuniary legacies bequeathed by the will, but is sufficient to pay in full the legacies and also the value of the annuity, the annuity should be valued, and the valuation may either be paid to the annuitant or invested in the purchase of an annuity as the annuitant chooses<sup>2</sup>. For this purpose a person entitled to the income of a fixed sum or fund is treated as an annuitant<sup>3</sup>. Again, where the estate is insufficient to pay in full the legacies and also the value of the annuity, the amount of the valuation should be treated as a legacy, and, all the legacies abating proportionately, the abated amount of the valuation should be paid to the annuitant<sup>4</sup>.

If the annuity is liable to forfeiture during the annuitant's life, the annuity is to be purchased in the names of the trustees and the annuitant is not entitled to have the amount of the valuation paid to him<sup>5</sup>.

1 *Wright v Callender* (1852) 2 De GM & G 652; *Re Cottrell, Buckland v Bedingfield* [1910] 1 Ch 402 at 407.



2 *Re Cottrell, Buckland v Bedingfield* [1910] 1 Ch 402.

3 *Re Richardson, Richardson v Richardson* [1915] 1 Ch 353; *Re Ellis, Nettleton v Crimmins* [1935] Ch 193.

4 *Re Cottrell, Buckland v Bedingfield* [1910] 1 Ch 402 at 407; *Re Cox, Public Trustee v Eve* [1938] Ch 556, [1938] 1 All ER 661; *Re Farmer, Nightingale v Whybrow* [1939] Ch 573, [1939] 1 All ER 319; *Re Wilson, Hartley v Marie Curie Hospital* [1940] Ch 966, [1940] 4 All ER 57. See also *Re Vardon, Brown v Vardon* [1938] 4 All ER 306, where there was a partial intestacy and the balance of the estate, after paying the value of her annuity to the widow, was applied first in paying her the sum of £1,000 in respect of her interest under the intestacy (see the Administration of Estates Act 1925 s 46(1) (as amended); and EXECUTORS AND ADMINISTRATORS) while the income of the residue was ordered to be applied in recouping to capital the value of the annuity. Legacies and annuities abate rateably: *Miller v Huddleston* (1851) 3 Mac & G 513; *Hume v Edwards* (1749) 3 Atk 693; *Rogers v Millicent* (1780) 2 Dick 570; and see EXECUTORS AND ADMINISTRATORS.

5 *Re Dempster, Borthwick v Lovell* [1915] 1 Ch 795.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/798. Variation of general rules in particular cases.

### 798. Variation of general rules in particular cases.

Although the rules as to bequests of annuities previously mentioned<sup>1</sup> are those in general to be observed where the testator's estate is insufficient to enable his directions to be carried out exactly, they are not of universal application and, as a matter of administration, other methods have in particular cases been adopted by the court. For instance, where it was clear that, owing to the ages and expectation of life of the surviving annuitants, there was no commercial risk that the annuities would not be paid in full, the court refused to direct payment on a valuation and the annuities were paid out of income as and when they fell due with resort to capital if required<sup>2</sup>. Again, where the estate is insufficient to set apart an annuity fund, which is given over subject to the annuities, the amount required for the annuity fund may be calculated and then treated as a legacy and abated equally with the other legacies; the annuities should then be paid out of the income and, if necessary, the capital of the abated fund<sup>3</sup>.

1 See PARAS 796-797 ante.

2 *Re Hill, Westminster Bank Ltd v Wilson* [1944] Ch 270, [1944] 1 All ER 502, CA.

3 *Re Nicholson, Chadwyck-Healey v Crawford* [1938] 3 All ER 270; *Re Thomas, Public Trustee v Falconer* [1946] Ch 36, [1945] 2 All ER 586. Cf *Re De Chassiron, Lloyds Bank Ltd v Sharpe* [1939] Ch 934, [1939] 3 All ER 321, cited in PARA 796 text and note 4 ante. See also EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/799. Valuation of annuities.

### 799. Valuation of annuities.

It is often necessary to value annuities given by will either because the annuitant is entitled to be paid the value of his annuity or for purposes of abatement<sup>1</sup>. In such cases the valuation should be on a strict actuarial basis having regard to the annuitant's age and his expectation of life<sup>2</sup>. Where an annuity is given free of income tax, the rate of tax and the reliefs and exemptions to be taken into account in the valuation are those in force at the date when the

valuation is made<sup>3</sup>. When the valuation is made by the court and there has been any material change in circumstances since the testator's death, the date of the order should be taken as the date of valuation and events happening since the death, such as the annuitant's death, should be regarded<sup>4</sup>. On the other hand the state of the annuitant's health is irrelevant<sup>5</sup>, as is the price at which an annuity can be purchased from an insurance company<sup>6</sup>. The matter is one of administration in which, although uniformity of practice is desirable, the court is not bound by rigid rules<sup>7</sup>. A perpetual annuity has been valued at such a sum as at the price of the day would purchase 2.5 per cent consols sufficient to produce the annuity, brokerage being excluded<sup>8</sup>.

1 See PARA 797 ante. As to proof by an annuitant in the administration of the estate of a person who has granted the annuity during his lifetime and has died insolvent see PARA 837 post.

2 *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* [1945] Ch 72, [1944] 2 All ER 593, where an annuity was granted by deed and the annuitant was seeking to prove in the administration of the grantor's estate on the footing that it was insolvent. In certain cases the valuation has been based on the amount of consols which would have been required at the price at the date of valuation to provide the annuity: see *Re Hollins, Hollins v Hollins* [1918] 1 Ch 503, CA; *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* supra. In such a case, as the purchase of consols is purely notional, allowances for brokerage need not be made: *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* supra at 77 and at 596. In other instances the valuation has been based on the sum required to purchase a government annuity of the amount specified by the testator: see *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 40, [1942] 2 All ER 629 at 634; *Westminster Bank Ltd v IRC* [1954] 1 All ER 240, [1954] 1 WLR 242 (valuation of an annuity for purposes of the former estate duty). As to the valuation of an annuity subject to protective trusts see PARA 887 post. See also EXECUTORS AND ADMINISTRATORS.

3 *Re Ball, Lucas v Ball* [1940] 4 All ER 245; *Re Twiss, Barclays Bank Ltd v Pratt* [1941] Ch 141, [1941] 1 All ER 93. As to the effect of the gift of annuity free of income tax and the annuitant's duty to account for reliefs see PARA 857 et seq post.

4 *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35, [1942] 2 All ER 629; *Re Ball, Lucas v Ball* [1940] 4 All ER 245; *Re Twiss, Barclays Bank Ltd v Pratt* [1941] Ch 141, [1941] 1 All ER 93; and see EXECUTORS AND ADMINISTRATORS.

5 *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 40, [1942] 2 All ER 629 at 634.

6 See the cases cited in PARA 801 note 4 post.

7 Where the testator's intentions as expressed cannot be carried out, the court must 'do the best it can': see *Re Bradberry, National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 40, [1942] 2 All ER 629 at 633. Cf *Westminster Bank Ltd v IRC* [1954] 1 All ER 240, [1954] 1 WLR 242. See also *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* [1945] Ch 72, [1944] 2 All ER 593, where the value was taken at the date of death, but, as the decree for administration was made less than seven months after the death, the difference made by the particular basis of valuation chosen cannot have been great.

8 *Hicks v Ross* [1891] 3 Ch 499, distinguishing *Hill v Rattey* (1862) 2 John & H 634.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/800. Power to purchase annuity.

### **800. Power to purchase annuity.**

If a simple bequest of an annuity is followed by a power to the trustees to purchase an annuity, then when the trustees have finally determined to exercise the power and have provided money for the purpose of the purchase the annuitant may claim to have the value of the annuity paid over to him<sup>1</sup>. If, however, the annuitant dies before the money has been provided, his representatives have not this right<sup>2</sup>.

1 *Re Mabbett, Pitman v Holborrow* [1891] 1 Ch 707; and see *Messeena v Carr* (1870) LR 9 Eq 260.

2 *Re Mabbett, Pitman v Holborrow* [1891] 1 Ch 707.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/801. Direction to purchase.

### 801. Direction to purchase.

A simple bequest of an annuity, followed by a direction to trustees to purchase an annuity<sup>1</sup> or a direction to purchase standing alone, is equivalent to a gift of the value of the annuity<sup>2</sup>. In such a case, if the annuitant elects to take a capital sum, the capital value should be calculated by reference to government tables<sup>3</sup> and not to the price at which it could be purchased from an insurance company<sup>4</sup>, unless the executors are given a direction to purchase from any public company<sup>5</sup>. If the annuitant elects to take the annuity then the annuitant is entitled to the best security for his annuity<sup>6</sup>.

In these cases the annuitant has a right to claim in cash the price to be paid for the annuity, and, if he dies before the purchase, his representatives have a similar right, even where his death occurs immediately after that of the testator<sup>7</sup>.

1 *Stokes v Cheek* (1860) 28 Beav 620; *Re Brunning, Gammon v Dale* [1909] 1 Ch 276.

2 *Yates v Compton* (1725) 2 P Wms 308; *Dawson v Hearn* (1831) 1 Russ & M 606; *Ford v Batley* (1853) 17 Beav 303; *Re Robbins, Robbins v Legge* [1907] 2 Ch 8, CA.

3 The sale of government annuities was discontinued in 1962 but tables for calculating their cost remain in force: see the Finance Act 1962 s 33(3). These tables may be varied by order of the Treasury made by statutory instrument: see s 33(4). The tables now in force are those laid down in the Government Annuity Table Order 1963, SI 1963/1178 (amended by SI 1968/1731; SI 1973/1407; SI 1974/1935); the Government Annuity Tables Order 1975, SI 1975/692; the Government Annuity Tables Order 1977, SI 1977/1536.

4 *Re Castle, Nesbitt v Baugh* [1916] WN 195; and see *Westminster Bank Ltd v IRC* [1954] 1 All ER 240 at 243, [1954] 1 WLR 242 at 246.

5 *Re Smith, Royal Exchange Assurance Co v Lee* (1923) 130 LT 185.

6 See *Ford v Batley* (1853) 17 Beav 303 at 304. Formerly, unless the executors were given a direction to purchase an annuity from any public company, they were required to purchase a government annuity: see the cases cited in note 4 supra. But since the discontinuance of government annuities (see note 3 supra) no new 'measuring rod' or rule of convenience seems to have been established for this purpose.

7 *Re Robbins, Robbins v Legge* [1907] 2 Ch 8, CA; *Re Brunning, Gammon v Dale* [1909] 1 Ch 276.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/802. Direction to invest a given sum.

### 802. Direction to invest a given sum.

Where the will contains a direction to trustees to invest a given sum in the purchase of an annuity for the annuitant's benefit<sup>1</sup>, the annuitant is entitled to the sum; and, if he dies before appropriation, his representatives have a similar right<sup>2</sup>.

1 See *Barnes v Rowley* (1797) 3 Ves 305; *Bayley v Bishop* (1803) 9 Ves 6; *Palmer v Craufurd* (1819) 3 Swan 483.

2 See the cases cited in PARA 800 note 1 ante; and *Re Hollins, Hollins v Hollins* [1918] 1 Ch 503, CA; *Re Marsh, Rhys v Needham* (1917) 62 Sol Jo 141. Cf *Re Strange, Lamb v Bossi Leu* (1916) 60 Sol Jo 640, where there was a direction to invest a share of residue in an annuity and part only of the residue had been realised at the annuitant's death.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/803. Gift over of fund set apart to provide for annuity.

### **803. Gift over of fund set apart to provide for annuity.**

Where there is a direction to appropriate a fund and the annuitant predeceases the testator, it seems that the gift over of the appropriated fund will not normally fail although the gift of the annuity has lapsed, but the question whether or not the gift over takes effect is one of construction of the particular will<sup>1</sup>.

1 *Re Clarke, Sheldon v Redrup* [1942] Ch 434, [1942] 2 All ER 294.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/804. Right to payment of value of annuity.

### **804. Right to payment of value of annuity.**

The right to have the cash value of a life annuity paid over to the annuitant is not interfered with by a power to trustees to apply the annuity for the annuitant's personal benefit<sup>1</sup>, or by a mere declaration that the annuitant is not to be entitled to receive the value of the annuity<sup>2</sup>. In order to prevent the annuitant having the value there must be a gift over<sup>3</sup>.

1 *Re Browne's Will* (1859) 27 Beav 324; see also *Woodmeston v Walker* (1831) 2 Russ & M 197; *Re Horne's Settlement, Coutts & Co v Duchessa Dumesnil de Smours* [1932] 2 Ch 180; *Re Ross, Ashton v Ross* [1900] 1 Ch 162, where the annuitants were women subject to a restraint on anticipation. As to the abolition of restraint on anticipation see MATRIMONIAL AND CIVIL PARTNERSHIP LAW. The law of Scotland differs on this point: *Branford's Trustees v Powell* 1924 SC 439, where an effective alimentary trust was established.

2 *Hatton v May* (1876) 3 ChD 148; *Hunt-Foulston v Furber* (1876) 3 ChD 285; *Re Mabbett, Pitman v Holborrow* [1891] 1 Ch 707 at 713; *Re Robbins, Robbins v Legge* [1907] 2 Ch 8, CA.

3 *Roper v Roper* (1876) 3 ChD 714 at 721.

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### **805. A perpetual annuity.**

The creation by will of a perpetual annuity may take the form of an unlimited gift of the income of a particular fund and, in such case, amounts to a gift of the capital from which the income arises, and the annuitant is entitled to payment of the capital accordingly<sup>1</sup>.

1 *Blight v Hartnoll* (1881) 19 ChD 294 at 296; *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222 at 229, CA; *Bent v Cullen* (1871) 6 Ch App 235 at 238; see *Evans v Walker* (1876) 3 ChD 211.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/806. Priority between annual sums given by will.

### 806. Priority between annual sums given by will.

Priority between annual sums given by will is in general a question of construction. A direction to pay an annuity out of residue may postpone it to other annuities previously given by the will<sup>1</sup>. Where a testator grants an annuity to A and 'subject thereto' devises estates, and by subsequent codicils charges the same estates with other annuities, A's annuity has priority<sup>2</sup>; but the words 'in the first place'<sup>3</sup>, or a direction to pay without abatement<sup>4</sup>, do not give priority.

Again, a direction as to the time of payment gives no priority. For example an annuity, deferred as to its time of payment, must in the distribution of assets rank equally with other annuities which are directed to be paid immediately<sup>5</sup>; and an annuity payable immediately has no priority over an annuity payable on the death of a tenant for life<sup>6</sup>, or over annuities which are directed to be paid after the payment of certain legacies<sup>7</sup>. Before 1926 an annuity given to a widow in lieu of dower had priority over legacies<sup>8</sup>, unless the testator left no real estate out of which she was dowable<sup>9</sup>, but as dower has now been in general abolished as regards deaths after 1925<sup>10</sup>, the former rule as to the priority of a widow's annuity is no longer of much practical importance.

1 *Haynes v Haynes* (1853) 3 De GM & G 590. Cf *Re Smith, Smith v Smith* [1899] 1 Ch 365; *Re Wiltshire's Estate* (1859) 6 Jur NS 190.

2 *Graves v Hicks* (1833) 6 Sim 391.

3 *Blower v Morret* (1752) 2 Ves Sen 420 at 421; *Thwaites v Foreman* (1844) 1 Coll 409.

4 *Re Evan's Charities* (1858) 10 I Ch R 271.

5 *Nickisson v Cockill* (1863) 3 De GJ & Sm 622; *Roche v Harding* (1858) 7 I Ch R 338; *Ashburnham v Ashburnham* (1848) 16 Sim 186.

6 *Miller v Huddleston* (1851) 3 Mac & G 513; *Street v Street* (1863) 2 New Rep 56.

7 *Ingham v Daly* (1882) 9 LR Ir 484.

8 *Stahlschmidt v Lett* (1853) 1 Sm & G 421; and see EXECUTORS AND ADMINISTRATORS.

9 *Acey v Simpson* (1842) 5 Beav 35; *Roper v Roper* (1876) 3 ChD 714. The fact that a legacy was given in satisfaction of dower did not affect the question whether it was charged on capital or income: *Stelfox v Sugden* (1859) John 234.

10 See REAL PROPERTY vol 39(2) (Reissue) PARA 161.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(3) CREATION OF ANNUITIES/(ii) Creation by Will/807. Cumulative and substitutional annuities.

### **807. Cumulative and substitutional annuities.**

Where more than one annuity is given to the same person by a testamentary disposition, a doubt frequently arises whether the annuitant is entitled to both annuities or whether the second is intended to be taken in the place of the first, in other words, whether the gifts are cumulative or substitutional<sup>1</sup>. The solution of this doubt depends to a large extent on the question whether the gifts are contained in the same instrument or in different instruments; and, although a codicil is in strictness merely a part of the will, if the first gift is in the will and the second in a codicil, the result may be different from that where the gifts are both in the will, or both in the same codicil<sup>2</sup>.

Thus, two annuities of the same amount given to the same person by the same testamentary instrument are *prima facie* substitutional<sup>3</sup>. On the other hand, two annuities of the same amount given to the same person by different testamentary instruments are *prima facie* cumulative<sup>4</sup>.

Gifts to the same person in the same testamentary instrument of annuities of different amounts are *prima facie* cumulative<sup>5</sup>; but the instrument may show an intention of substitution<sup>6</sup>. Gifts to the same person in separate testamentary instruments of several annuities are *prima facie* cumulative, whether the amounts are the same or different<sup>7</sup>.

<sup>1</sup> The question whether a bequest of a legacy of an annuity is cumulative to, or in substitution for, a gift of an annuity by instrument *inter vivos* has been discussed in PARA 766 ante.

<sup>2</sup> The question is one of intention, ascertained on construction of the will as a whole: see *Guy v Sharp* (1833) 1 My & K 589 at 603; and WILLS vol 50 (2005 Reissue) PARAS 685-687.

<sup>3</sup> *Holford v Wood* (1798) 4 Ves 76 at 90, where an annuity of £30 was given to A for life with specific directions as to the mode and times of payment, and in a subsequent part of the will the testator gave to A 'the butler, £30 a year for his life'; *Brine v Ferrier* (1835) 7 Sim 549, where a will was composed of three separate sheets, and the same annuity to the same person was repeated upon two of the sheets. The instrument may show that the two annuities are intended to be successive: *Baylee v Quin* (1842) 2 Dr & War 116.

<sup>4</sup> *Roch v Callen* (1848) 6 Hare 531; *Barclay v Wainwright* (1797) 3 Ves 462 at 465; *A-G v George* (1836) 8 Sim 138 at 146, 147; and see *Tweeddale v Tweeddale* (1840) 10 Sim 453; *Spire v Smith* (1839) 1 Beav 419; *Radburn v Jervis* (1841) 3 Beav 450. Cf *Osborne v Duke of Leeds* (1800) 5 Ves 369 at 382.

<sup>5</sup> *Yockney v Hansard* (1844) 3 Hare 620 at 622; *Hartley v Ostler* (1856) 22 Beav 449; and see *Mackinnon v Peach* (1838) 2 Keen 555.

<sup>6</sup> *Yockney v Hansard* (1844) 3 Hare 620; *Adnam v Cole* (1843) 6 Beav 353.

<sup>7</sup> *Barclay v Wainwright* (1797) 3 Ves 462 at 465; *Spire v Smith* (1839) 1 Beav 419; *Radburn v Jervis* (1841) 3 Beav 450; *Wilson v O'Leary* (1872) 7 Ch App 448; but cf *Re Michell, Thomas v Hoskins* [1929] 1 Ch 552, where the two instruments were executed on the same day and held to be duplicates.

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### **(iii) Creation by or under Statutory Powers**

#### **808. Annuities payable out of public revenues.**

Annuities are by statute payable out of public funds for the benefit of certain members of the Royal Family<sup>1</sup>, and annuities from time to time have been made payable by statute for the benefit of persons who have rendered distinguished public service<sup>2</sup>.

The power of the National Debt Commissioners to grant annuities for limited purposes is dealt with elsewhere in this work<sup>3</sup>.

<sup>1</sup> See the Civil List Act 1937 s 3 (as amended); the Civil List Act 1952 s 3 (as amended); the Civil List Act 1972 s 2 (as amended); and CROWN AND ROYAL FAMILY.

<sup>2</sup> See eg Mr Speaker Morrison's Retirement Act 1959 (annuities for life for a former Speaker and his wife in the event of her surviving him); the Trafalgar Estates Act 1947 (terminating annuity settled by 46 Geo 3 c 46 (1806) on holder for time being of title of Earl Nelson).

<sup>3</sup> See the Government Annuities Act 1929; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1371 et seq.

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### **809. Annuities under housing legislation.**

Where the person having control of a dwelling had completed in respect of the dwelling works required to be executed by a repair notice or an improvement notice served before 1 April 1990, he could apply to the local housing authority for a charging order charging on the property an annuity to repay the expenses of the works and the costs of obtaining the order<sup>1</sup>. Although described as an annuity in the relevant enactments, the annual sum so charged appears to be really in the nature of a rentcharge<sup>2</sup>, and is redeemable<sup>3</sup>.

<sup>1</sup> See the Housing Act 1957 ss 14, 15 (repealed); the Housing Act 1985 ss 200, 201, 229, 230 (repealed with savings). As to repairs and improvements see generally HOUSING.

<sup>2</sup> See the Housing Act 1957 s 15(3) (repealed) which provided that such an annuity might be recovered by the same means and in the like manner in all respects as a rentcharge granted by deed. Annuities charged under ss 14, 15 (repealed) were excepted from the general prohibition of the creation of new rentcharges: see the Rentcharges Act 1977 s 2(3)(d); and PARA 774 ante.

<sup>3</sup> See PARA 906 post.

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### **810. Annuities for raising money.**

Powers have been given by various local Acts to raise money by the creation of annuities. In general, this power was given for a specific purpose, as, for example, to meet the expenses of paving and lighting a town<sup>1</sup>, or repairing or rebuilding a church<sup>2</sup>. Local authorities at one time had a general power to raise money, which they were authorised to borrow, by the issue of annuity certificates<sup>3</sup>.

1 See *Cane v Chapman* (1836) 5 Ad & El 647.

2 *Delarue v Church* (1851) 20 LJ Ch 183.

3 See the Local Government Act 1972 s 172, Sch 13 para 2(1)(c) (repealed by the Local Government and Housing Act 1989 s 194(2), Sch 12 Pt I). As to the borrowing powers of local authorities see now the Local Government and Housing Act 1989 ss 43-47.

## UPDATE

### 810 Annuities for raising money

NOTE 3--Local Government and Housing Act 1989 ss 43-47 repealed: Local Government Act 2003 Sch 7 para 29, Sch 8 Pt 1. See further LOCAL GOVERNMENT vol 29(1) (Reissue) PARA 594 et seq.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(4) COMMENCEMENT AND DURATION/(i) Rentcharges/811. Future commencement.

## (4) COMMENCEMENT AND DURATION

### (i) Rentcharges

#### 811. Future commencement.

Since 1925 a legal rentcharge cannot be granted so as to commence in the future, for only a rentcharge in possession can subsist as a legal estate, but for this purpose a rentcharge (not being a rentcharge limited to take effect in remainder after or expectant on the failure or determination of some other interest) is in possession notwithstanding that its payment is to commence at a time subsequent to its creation<sup>1</sup>. If a rentcharge, such as a jointure, is intended to commence after the death of the tenant for life, this can only be effected in equity by way of trust<sup>2</sup>.

1 See PARA 754 ante.

2 See PARA 779 ante.

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#### 812. Duration.

With certain exceptions, every rentcharge<sup>1</sup>, if it has not then ceased to have effect, will be extinguished at the expiry of the period of 60 years beginning with 22 July 1977<sup>2</sup>, or with the date when the rentcharge first became payable, whichever is the later<sup>3</sup>. Under the general law, the duration of a rentcharge in any event cannot exceed that of the estate out of which it is



granted<sup>4</sup>. Subject to these limitations, however, the duration of a rentcharge depends on the terms of the grant<sup>5</sup>. If the owner of a perpetual rentcharge<sup>6</sup> issuing out of freehold land grants it inter vivos or devises it by will without words of limitation, the grantee or devisee will normally take the rentcharge for a beneficial estate in fee simple, as by statute a conveyance of freehold land<sup>7</sup> executed after 1925, or a devise of real estate, passes the fee simple or other the whole estate of the grantor or testator, unless a contrary intention appears<sup>8</sup>. It has, however, been held that the statutory provision relating to the effect of a devise<sup>9</sup> applies only to a devise of an estate existing and vested in the testator at his death, and that a gift, without words of limitation, of a rentcharge created by a will gives to the donee only a life estate<sup>10</sup>. In a deed executed after 1881 a grant of a rentcharge 'in fee simple' creates a perpetual rentcharge<sup>11</sup>.

After 1925 an estate tail in a rentcharge became an equitable interest and could only be created as an entailed interest under a settlement<sup>12</sup>, and only by the like expressions as those by which before 1926 a similar estate tail could have been created by deed; expressions which would have had that effect in a will or other executory instrument were not sufficient<sup>13</sup>. It has not been possible to create an estate tail since 31 December 1996<sup>14</sup>.

In the case of an interest during the life of another, where the grantee of the rentcharge predeceases that other person the beneficial interest of the grantee passes to his personal representative<sup>15</sup>.

1 For the meaning of 'rentcharge' in the Rentcharges Act 1977 see PARA 774 note 1 ante.

2 Ie the date of passing of the Rentcharges Act 1977.

3 Ibid s 3(1). See further PARA 894 post.

4 See eg *Alton Woods' Case* (1600) 1 Co Rep 40b at 48b; *Saffery v Elgood* (1834) 1 Ad & El 191. Cf *Monypenny v Monypenny* (1861) 9 HL Cas 114. See also PARA 783 ante.

5 See *Drew v Barry* (1874) IR 8 Eq 260 at 284, Ir CA (rules of construction applicable to limitation of estates in land also applicable to limitation of estates in rentcharges). See also *Beachway Management Ltd v Wisewell* [1971] Ch 610, [1971] 1 All ER 1, where there was a grant of a rentcharge until the roads of an estate 'shall have been adopted and taken over by the local authority'.

6 Note that a rentcharge which falls within the Rentcharges Act 1977 s 3 will have ceased to be a perpetual rentcharge.

7 A rentcharge is within the definition of 'land' in the Law of Property Act 1925: see s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and PARA 761 note 1 ante.

8 As to conveyances executed after 1925 see the Law of Property Act 1925 s 60(1), (4) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 93. As to devises see the Wills Act 1837 s 28 (as amended); and WILLS vol 50 (2005 Reissue) PARA 660.

9 Ie ibid s 28 (as amended): see WILLS vol 50 (2005 Reissue) PARA 660.

10 *Nichols v Hawkes* (1853) 10 Hare 342. Where, however, an annuity charged on real estate was given by will to a beneficiary for life together with a power to appoint it by will, the court held that the gift created a perpetual rentcharge: *Townsend v Ascroft* [1917] 2 Ch 14.

11 See the Law of Property Act 1925 s 60(4) proviso (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 93. In *Re Stinson's Estate* [1910] 1 IR 47, a perpetual rentcharge was held to have passed in equity under a grant without words of inheritance where the intention sufficiently appeared by the deed; cf *Re Gillman's Estate* (1875) IR 10 Eq 92 at 94.

12 See the Law of Property Act 1925 s 130(1), (4), (6) (s 130(1), (6) repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

13 See the Law of Property Act 1925 s 130(1), (2) (s 130(1) now repealed: see note 12 supra); and REAL PROPERTY vol 39(2) (Reissue) PARA 119.

14 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARAS 105, 119.

15 See EXECUTORS AND ADMINISTRATORS; REAL PROPERTY vol 39(2) (Reissue) PARA 155.

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## (ii) Annuities

### 813. Commencement and duration of annuities.

Unless otherwise expressed, an annuity created by deed commences from the execution of the deed<sup>1</sup>. An annuity arising under a will *prima facie* commences from the testator's death<sup>2</sup>, but the will may direct a later commencement<sup>3</sup>.

An annuity may be (1) for the annuitant's life; or (2) perpetual; or (3) for some period other than the annuitant's life<sup>4</sup>.

1 *Weston v Bowes* (1742) 9 Mod Rep 309.

2 *Re Robbins, Robbins v Legge* [1906] 2 Ch 648 at 653; *affd* [1907] 2 Ch 8, CA. See also *Gibson v Bott* (1802) 7 Ves 89 at 96; *Stamper v Pickering* (1838) 9 Sim 176; *Pettinger v Ambler* (1865) 34 Beav 542; *Re Brunning, Gammon v Dale* [1909] 1 Ch 276. Where an annuity is directed to be paid by monthly payments, the first payment should be made at the end of the first month after the testator's death: *Houghton v Franklin* (1823) 1 Sim & St 390; *Byrne v Healy* (1828) 2 Mol 94; *Irvin v Ironmonger* (1831) 2 Russ & M 531. Cf *Brown's Trustees v Thom* (1915) 53 SLR 59, where the testator had directed that an annuity be purchased with a share of the residue and the trustees did not purchase the annuity, the annuitant having died two days after the testator. See further EXECUTORS AND ADMINISTRATORS.

3 *Turner v Probyn* (1792) 1 Anst 66; *Storer v Prestage* (1818) 3 Madd 167; *Lord Hartland v Lyster* (1833) Hayes & Jo 305; *Rawson v M'Causland* (1873) 22 WR 145; *Ingham v Daly* (1882) 9 LR Ir 484; *Harvey v Harvey* (1915) 50 ILT 12. See also *Re Bywater, Bywater v Clarke* (1881) 18 ChD 17, CA, where a gift of annuities to arise at a future time was not accelerated by a subsequent direction for their earlier payment; and see WILLS.

4 *Blewitt v Roberts* (1841) Cr & Ph 274 at 280.

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### 814. Annuities for life.

An annuity given by will to a person in simple form, without words of limitation, is for life only<sup>1</sup>. This is the general rule, so that if a longer duration is claimed, the claimant must establish an exception<sup>2</sup>. Even where an annuity is given by will to one person for life and then to another simply, both persons take life annuities only<sup>3</sup>.

1 *Savery v Dyer* (1752) Amb 139; *Yates v Maddan* (1851) 3 Mac & G 532; *Blight v Hartnoll* (1881) 19 ChD 294 at 296; *Re Taber, Arnold v Kayess* (1882) 51 LJ Ch 721; *Re Forster's Estate* (1889) 23 LR Ir 269, where there was a provision for commutation; *Re Cannon, Cannon v Cannon* (1915) 114 LT 231. A promise by a father on his daughter's marriage to allow her an annuity inures for their joint lives only: *Re Curtis, ex p Annandale* (1834) 4 Deac & Ch 511; *Re Lindrea, Lindrea v Fletcher* (1913) 109 LT 623.

2 *Yates v Maddan* (1851) 3 Mac & G 532 at 543; *Hill v Rattey* (1862) 2 John & H 634 at 639.

3 *Blight v Hartnoll* (1881) 19 ChD 294 at 297; *Blewitt v Roberts* (1841) Cr & Ph 274; *Lett v Randall* (1860) 2 De GF & J 388.

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### 815. Perpetual annuities.

An annuity bequeathed to a person is perpetual where the words indicate its perpetual continuance after his death<sup>1</sup>, as, for instance, where the annuitant is given power to leave it by will<sup>2</sup>, where the annuity is given to him for ever<sup>3</sup>, or where there is a gift over if he dies without issue<sup>4</sup>, or where, in the case of an annuity given to several without survivorship, there is a direction for the sale at a particular period of the annuity in its integrity<sup>5</sup>. A perpetual annuity may be given to a corporation or to an unincorporated body<sup>6</sup>.

A direction to purchase an annuity in government securities to the amount of so much a year may pass a perpetual annuity<sup>7</sup>. Again, an annuity is perpetual where the words amount to a gift of the income of a particular fund without limit of time<sup>8</sup>.

An unlimited gift of an annual sum 'being the interest of' stock may<sup>9</sup> carry the principal<sup>10</sup>, but a mere charge of an annuity on a particular fund does not render it perpetual<sup>11</sup>, nor does a charge on land devised in fee simple<sup>12</sup>. A charge on leasehold property may cause an annuity to continue during the lease<sup>13</sup>.

1 *Mansergh v Campbell* (1858) 3 De G & J 232; *Pawson v Pawson* (1854) 19 Beav 146; see *Haggar v Neatby* (1854) Kay 379; *Hill v Potts* (1862) 31 LJ Ch 380.

2 *Townsend v Ascroft* [1917] 2 Ch 14.

3 *Taylor v Martindale* (1841) 12 Sim 158; *Joynt v Richards* (1882) 11 LR Ir 278; *Ashton v Adamson* (1841) 1 Dr & War 198.

4 *Hedges v Harpur*, *Hedges v Blick* (1858) 3 De G & J 129; *Robinson v Hunt* (1841) 4 Beav 450; *Warren v Wright* (1861) 12 I Ch R 401; *Fielding v Preston* (1857) 5 WR 851; *Barden v Meagher* (1867) 1 IR Eq 246; and see *Ward v Ward* [1903] 1 IR 211.

5 *Mansergh v Campbell* (1858) 3 De G & J 232 at 241.

6 *Re Jones, Midland Bank Executor and Trustee Co Ltd v League of Welldoers* [1950] 2 All ER 239.

7 *Ross v Borer* (1862) 2 John & H 469; *Kerr v Middlesex Hospital* (1852) 2 De GM & G 576. See, however, *Re Grove's Trusts* (1859) 1 Giff 74; *Re Taber, Arnold v Kayess* (1882) 51 LJ Ch 721 at 723.

8 *Blewitt v Roberts* (1841) Cr & Ph 274 at 280; *Blight v Hartnoll* (1881) 19 ChD 294 at 296. See also *Stokes v Heron* (1845) 12 Cl & Fin 161, HL; *Potter v Baker* (1852) 15 Beav 489; *Hicks v Ross* (1872) LR 14 Eq 141; *Haggar v Neatby* (1854) Kay 379; *Bent v Cullen* (1871) 6 Ch App 235 at 238; *Dawson v Robinson* (1871) 25 LT 486.

9 See *Re Levy, Barclays Bank Ltd v Board of Guardians and Trustees for Relief of Jewish Poor* [1960] Ch 346, [1960] 1 All ER 42, CA, which shows that where the donor has by his gift shown an intention that only income should be used, and the gift is for charitable purposes so that a continuing gift of income of property will not offend the rule against perpetuities, a transfer of the principal cannot be claimed effectively by the donee.

10 *Stretch v Watkins* (1816) 1 Madd 253; *Rawlings v Jennings* (1806) 13 Ves 39; *Engelhardt v Engelhardt* (1878) 26 WR 853.

11 *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222 at 228, CA; *Blight v Hartnoll* (1881) 19 ChD 294 at 297; and see *Wilson v Maddison* (1843) 2 Y & C Ch Cas 372.

12 *Mansergh v Campbell* (1858) 3 De G & J 232 at 237.

13 *Courtenay v Gallagher* (1856) 5 I Ch R 154, 356; *Re Finlay's Estate* [1907] 1 IR 24. Cf *Re Cunningham, Dulcken v Cunningham* [1914] 1 Ch 427, where an annuity to charity charged on leaseholds held for 999 years was held to continue during that period.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(4) COMMENCEMENT AND DURATION/(ii) Annuities/816. Effect of words of limitation in grant of annuity.

### **816. Effect of words of limitation in grant of annuity.**

Although an annuity is personal estate<sup>1</sup>, an annuity could before 1926 be given in such a manner as to devolve on death in the same manner as real estate<sup>2</sup>. Thus, a gift of an annuity to a person and his heirs conferred on him an estate in fee simple which, unless he alienated it, descended to his heirs, and not to his next of kin<sup>3</sup>. As descent to the heir has, in general, been abolished and the same rules govern the succession to real estate and to personal estate on intestacy<sup>4</sup>, it seems that since 1925 the only effect of framing a gift of an annuity in the form of a gift to the donee and his heirs is to show that the annuity is intended to be a perpetual annuity and not merely an annuity for the donee's life<sup>5</sup>. Before 1926, if an annuity was limited to a person and the heirs of his body, a conditional fee was created and the donee could alienate the annuity as soon as an heir of his body was born<sup>6</sup>. Between 1926 and 1997, it seems that such a limitation would normally have created an entailed interest in the donee<sup>7</sup>. It has not been possible to create an entailed interest since 31 December 1996<sup>8</sup>.

1 See PARA 763 ante. The fact that a gift of an annuity might contain words of limitation appropriate to create an estate of fee simple in realty did not affect the character of the annuity as personal estate, although it might formerly affect the devolution of the annuity on death: *Aubin v Daly* (1820) 4 B & Ald 59; *Radburn v Jervis* (1841) 3 Beav 450.

2 *Turner v Turner* (1783) Amb 776 at 782-783.

3 *Bignold v Giles* (1859) 4 Drew 343 at 346. As to the effect of a grant of real estate to a person and his heirs see REAL PROPERTY VOL 39(2) (Reissue) PARA 93. Where, however, annuities were given to the testator's six children or their heirs, the next of kin of a child who was dead at the date of the will were, and the heir at law was not, held entitled to an annuity: *Parsons v Parsons* (1869) LR 8 Eq 260.

4 See the Administration of Estates Act 1925 s 45(1); and EXECUTORS AND ADMINISTRATORS.

5 See eg *Aubin v Daly* (1820) 4 B & Ald 59, where an annuity granted to a man and his heirs was held to pass under a residuary bequest in a will. Cf *Ferard v Griffin* (1838) 2 Keen 615, where a gift by will of an annuity to the testator's brother during his life was followed by a statement that the legacies were to be understood to be left to the legatees and their heirs, and the annuitant took the annuity for life only. In *Parsons v Parsons* (1869) as reported in 17 WR 1005, gifts of annuities to the testator's children or their heirs were held to be gifts of perpetual annuities. Cf *Re Morgan, Morgan v Morgan* [1893] 3 Ch 222, CA, where there were gifts of annuities to persons or their descendants, and the annuitants took for life only.

6 *Bignold v Giles* (1859) 4 Drew 343 at 347; see also *Earl of Stafford v Buckley* (1750) 2 Ves Sen 170 at 180; *Turner v Turner* (1783) Amb 776 at 782-783; *Re Rivett-Carnac's Will* (1885) 30 ChD 136 at 141; and REAL PROPERTY VOL 39(2) (Reissue) PARA 114 note 2. Cf *Re Wynch's Trusts, ex p Wynch* (1854) 5 De GM & G 188, where there was a bequest of an annuity to a woman for life and the issue of her body. Such a limitation created a conditional fee and not an estate tail because 13 Edw 1 (Statute of Westminster the Second) (1285) c 1 applied only to tenements (see Co Litt 20a; and REAL PROPERTY VOL 39(2) (Reissue) PARA 78) and did not apply to other hereditaments (see *Bignold v Giles* supra; and REAL PROPERTY VOL 39(2) (Reissue) PARA 114 note 2). An entailed interest in an annuity could, it seems, be created by statute: see *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940 at 976.

7 See the Law of Property Act 1925 s 130(1), (6) (s 130(1) repealed by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and see PERSONAL PROPERTY vol 35 (Reissue) PARA 1230; SETTLEMENTS.

8 See the Trusts of Land and Appointment of Trustees Act 1996 s 2(6), Sch 1 para 5; and REAL PROPERTY vol 39(2) (Reissue) PARAS 105, 119.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(4) COMMENCEMENT AND DURATION/(ii) Annuities/817. Annuities created for definite period other than life.

### **817. Annuities created for definite period other than life.**

Where there is a gift by will of an annuity to a person for some period other than his own life, or for some particular purpose which may last only during some such definite period, the general rule is that the gift is for that period and for that period only.

Thus, a gift of an annuity for a term or during the life of another is a gift to the annuitant and his representatives during the term or during that other life<sup>1</sup>. The same rule applies where the other life is that of the grantor<sup>2</sup>. An annuity given to one person during the life of another continues during the life of that other, even if the grantee predeceases him<sup>3</sup>; and an annuity given to the testator's son from his majority to the death or second marriage of the testator's widow continues during that period, notwithstanding that the son dies before the widow, the annuity being payable after the son's death to his representatives<sup>4</sup>.

1 *Re Ord, Dickinson v Dickinson* (1879) 12 ChD 22 at 25, CA.

2 *Reid v Coggans (or Reid)* [1944] AC 91, [1944] 1 All ER 134, HL, where an annuity was payable under a bond during the grantor's life.

3 *Savery v Dyer* (1752) Amb 139.

4 *Re Ord, Dickinson v Dickinson* (1879) 12 ChD 22 at 25, CA. See also *Re Drayton, Francis v Drayton* (1912) 56 Sol Jo 253. Cf *Sutcliffe v Richardson* (1872) LR 13 Eq 606; and see *Re Cannon, Cannon v Cannon* (1915) 114 LT 231; *Re Meeking, Meeking v Meeking* [1922] 2 Ch 523, where an annuity to continue while A was entitled to certain estates as tenant for life or tenant in tail male was not destroyed by a disentailing assurance by A. As to disentailing assurances see REAL PROPERTY vol 39(2) (Reissue) PARA 121 et seq.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(4) COMMENCEMENT AND DURATION/(ii) Annuities/818. Annuity limited to two persons.

### **818. Annuity limited to two persons.**

A single annuity given to two persons during their lives continues during the life of the survivor, who after the other's death takes the whole<sup>1</sup>; but under a direction to purchase an annuity for the life of two named persons to be equally divided between them, the annuity continues during the joint lives only<sup>2</sup>. In such a case, however, a gift over after the deaths of the two named persons may cause the annuity to continue for the survivor's benefit during his life<sup>3</sup>. A single annuity, given to two persons expressly during their lives and the life of the survivor in equal shares, continues during that period but without survivorship, the share of the one who dies the earlier going to his representative<sup>4</sup>; but in a case of this kind, where the gift is to the

two persons during their lives and the life of the survivor with a gift over after the survivor's death, the survivor is entitled to receive the whole annuity<sup>5</sup>.

A trust to pay an annual sum to three people or such one or more of them as shall for the time being be living and if more than one shall be living to be received by them in equal shares creates one continuing annuity<sup>6</sup>.

1 *Alder v Lawless* (1863) 32 Beav 72; *Moffatt v Burnie* (1853) 18 Beav 211.

2 *Grant v Winbolt* (1854) 23 LJ Ch 282.

3 *Re Telfair, Garrioch v Barclay* (1902) 86 LT 496; and see *M'Dermott v Wallace* (1842) 5 Beav 142.

4 *Bryan v Twigg* (1867) 3 Ch App 183; *Jones v Randall* (1819) 1 Jac & W 100.

5 *Cranswick v Pearson, Pearson v Cranswick* (1862) 31 Beav 624; affd (1863) 9 LT 275. For a discussion of the general principle on which these cases were decided see *Re Hobson, Barwick v Holt* [1912] 1 Ch 626 at 631 per Parker J.

6 *Re Tapp, Gonville and Caius College, Cambridge v IRC* [1959] Ch 443 at 458, [1959] 1 All ER 705 at 710, CA.

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### **819. Separate annuities to two persons.**

Under a gift of separate annuities to two persons for their lives and the life of the survivor, each takes an annuity continuing during their joint lives and the life of the survivor<sup>1</sup>; but if such a bequest contains the additional words 'for their or her absolute use and benefit' the annuity of the one who dies earlier survives to the other for his life<sup>2</sup>. Under a gift to two persons of an annual sum each so long as they shall live, they take several annuities each continuing for the annuitant's life<sup>3</sup>. A bequest of an annuity to several persons during their lives, without words of survivorship, is a bequest to each of them of a separate annuity equal to an aliquot share of the whole, and, upon the death of each, his separate annuity ceases<sup>4</sup>.

1 *Eales v Earl of Cardigan* (1838) 9 Sim 384. Cf the construction adopted in *Re Ross, Ashton v Ross* [1900] 1 Ch 162.

2 *Hatton v Finch* (1841) 4 Beav 186.

3 *Lill v Lill* (1857) 23 Beav 446.

4 *Re Evans, Thomas v Thomas* (1908) 77 LJ Ch 583.

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### **820. Annuities bequeathed during the lives of animals.**

The bequest of an annuity to an executor to be paid for the keep of the testator's mare has been held to be a valid gift of an annuity during the mare's life, the executor being entitled beneficially to any surplus not required for its keep<sup>1</sup>. Again, where a testator charged land with payment to his trustees of an annuity for the term of 50 years if any of his horses and hounds should so long live, the annuity to be applied in their maintenance, the gift was held to be valid<sup>2</sup>; but this decision is questionable, as it seems that duration of such an annuity should for the purposes of the rule against perpetuities be confined to human lives<sup>3</sup> or 21 years or the full perpetuity period<sup>4</sup>.

1 *Pettingall v Pettingall* (1842) 11 LJ Ch 176.

2 *Re Dean, Cooper-Dean v Stevens* (1889) 41 ChD 552; see also *Re Howard, Oakley v Aldridge* (1908) Times, 30 October; and see CHARITIES vol 8 (2010) PARA 60.

3 See PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1014.

4 See *Re Kelly, Cleary v Dillon* [1932] IR 255, where a bequest was held severable and valid for 21 years. As to the application of the Perpetuities and Accumulations Act 1964 to purpose trusts see Maudsley's Modern Law of Perpetuities 177 et seq. See also TRUSTS vol 48 (2007 Reissue) PARA 607.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(4) COMMENCEMENT AND DURATION/(ii) Annuities/821. Annuity to trustee or executor.

### **821. Annuity to trustee or executor.**

An annuity bequeathed to a trustee or executor for his trouble<sup>1</sup>, or so long as he executes the office, continues so long as duties or trusts remain to be performed, and are performed, by the annuitant<sup>2</sup>. It does not cease upon judgment in an administration action<sup>3</sup>. Where, however, annuities were bequeathed to trustees for their services and collecting of rents, and the trustees employed a collector whose expenses, to an amount exceeding the annuities, were allowed to the trustees in an administration action, the trustees were not entitled to the annuities<sup>4</sup>.

1 *Baker v Martin* (1836) 8 Sim 25; *Henrion v Bonham* (1844) Drury temp Sug 476; *M'Dermot v O'Conor* (1876) IR 10 Eq 352 at 357; *Clay v Coles* [1880] WN 145.

2 *Hull v Christian* (1874) LR 17 Eq 546; and see EXECUTORS AND ADMINISTRATORS.

3 *M'Dermot v O'Conor* (1876) IR 10 Eq 352 at 356; *Baker v Martin* (1836) 8 Sim 25.

4 *Re Muffet, Jones v Mason* (1887) 56 LJ Ch 600, CA.

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### **822. Annuities for maintenance.**

An annuity to the testator's widow during a daughter's minority, for the daughter's maintenance and education, is not terminated by the widow's death during the minority<sup>1</sup>. A gift of an annuity for the maintenance of a named person without further qualification is, at any

rate where that person is an adult<sup>2</sup>, prima facie an absolute gift for his benefit<sup>3</sup>; if the donee is a minor, the gift is not confined to his minority<sup>4</sup> unless expressly so limited, and, if given for the life of another, may continue during that other person's life even though the donee predeceases him<sup>5</sup>. A gift for the maintenance and education of children, where no definite period is mentioned, amounts to a gift for the joint lives of the children and the survivor of them, the children for the time being entitled taking as joint tenants until they sever<sup>6</sup>. Again, a gift of an annuity during a definite period to a widow, for her own benefit and for the maintenance and education of a class of children, may create a trust not limited to children under 21 or unmarried<sup>7</sup>. Under such a trust, the widow is entitled to a separate interest<sup>8</sup>, which may be attached by a judgment creditor<sup>9</sup>.

1 *Re Yates, Yates v Wyatt* [1901] 2 Ch 438.

2 *Younghusband v Gisborne* (1844) 1 Coll 400; *Lewes v Lewes* (1848) 16 Sim 266; *Williams v Papworth* [1900] AC 563 at 567, PC.

3 *Webb v Kelly* (1839) 9 Sim 469 at 472.

4 *Soames v Martin* (1839) 10 Sim 287; *Alexander v M'Culloch* (1787) 1 Cox Eq Cas 391; *Farr v Hennis* (1881) 44 LT 202, CA.

5 *Webb v Kelly* (1839) 9 Sim 469; *Lewes v Lewes* (1848) 16 Sim 266; *Bayne v Crowther* (1855) 20 Beav 400; *Attwood v Alford* (1866) LR 2 Eq 479. For criticism of these decisions see Jarman on Wills (8th Edn) 926.

6 *Wilkins v Jodrell* (1879) 13 ChD 564; *Williams v Papworth* [1900] AC 563, PC; *Soames v Martin* (1839) 10 Sim 287. Cf *Gardiner v Barber* (1854) 18 Jur 508.

7 *Longmore v Elcum* (1843) 2 Y & C Ch Cas 363; *Re Booth, Booth v Booth* [1894] 2 Ch 282. Cf *Wilkins v Jodrell* (1879) 13 ChD 564 at 572. Note that the age of majority is now 18, not 21 as it was at the dates when these cases were decided: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.

8 *Re G (Infants)* [1899] 1 Ch 719 at 725.

9 *Nash v Pease* (1878) 47 LJQB 766, DC.

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### **823. Annuities during widowhood or spinsterhood.**

An annuity may be validly given to a woman during her widowhood<sup>1</sup>. A gift of an annuity by will to a woman so long as she continues to be the testator's widow ceases on her death or remarriage<sup>2</sup>. The remarriage must, of course, be a valid ceremony<sup>3</sup>. Such an interest was held to continue notwithstanding a ceremony of marriage celebrated between a woman and her deceased sister's husband before the contracting of such a marriage was made legal<sup>4</sup>. Where, in the case of such a gift, the woman is not the testator's wife at his death, the gift is inoperative<sup>5</sup>, except where it appears that the testator meant to use the word 'widow' in a secondary sense<sup>6</sup>.

The gift of an annuity to a single woman until she dies or is married is valid, and will cease upon her death or marriage<sup>7</sup>; and it seems that a similar limitation of a rentcharge, which is real estate, would follow the same rule<sup>8</sup>. A gift of income to a woman so long as she remained unmarried has, in cases where there was no gift over or disposition of the capital on her marriage, been construed as an indefinite gift of income, so that the donee remaining unmarried took an absolute interest<sup>9</sup>, but, if there is a gift over or disposition of capital on marriage, the donee takes merely an interest terminable on death or marriage<sup>10</sup>. If the will



includes a gift over to a person after another person's marriage or if the other person marries, the first-mentioned person takes upon the other dying unmarried<sup>11</sup>.

- 1 *Scott v Tyler* (1788) 2 Dick 712 at 721; *Morley v Rennoldson*, *Morley v Linkson* (1843) 2 Hare 570 at 580.
- 2 *Rishton v Cobb* (1839) 5 My & Cr 145 at 152; *Boddington, Boddington v Clairat* (1884) 25 ChD 685 at 691, CA; see *May v May* (1871) 19 WR 432.
- 3 *Re M'Loughlin's Estate* (1878) 1 LR Ir 421; *Re Rutter, Donaldson v Rutter* [1907] 2 Ch 592.
- 4 *Re Whitfield, Hill v Mathie* [1911] 1 Ch 310; and see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 40.
- 5 *Re Boddington, Boddington v Clairat* (1884) 25 ChD 685 at 691, CA (nullity); *Re Hammond, Burniston v White* [1911] 2 Ch 342 (bigamous marriage).
- 6 *Re Wagstaff, Wagstaff v Jalland* [1908] 1 Ch 162, CA.
- 7 *Webb v Grace* (1848) 2 Ph 701; *Heath v Lewis* (1853) 3 De GM & G 954 at 956; *Potter v Richards* (1855) 1 Jur NS 462; *Re King's Trusts* (1892) 29 LR Ir 401; *Re Hewett, Eldridge v Iles* [1918] 1 Ch 458.
- 8 In so far as not prohibited, as from 22 August 1977, by the Rentcharges Act 1977 s 2 (as amended) (see PARAS 774-775 ante): see *Jones v Jones* (1876) 1 QBD 279. Note, however, the Rentcharges Act 1977 s 2(3) (as amended); and PARA 774 ante.
- 9 *Rishton v Cobb* (1839) 5 My & Cr 145; *Re Howard, Taylor v Howard* [1901] 1 Ch 412, where the executrix of the donee was held entitled to the capital of the fund.
- 10 *Re Mason, Mason v Mason* [1910] 1 Ch 695, CA; *Re Henry Will Trust, Mussett v Smith* [1953] 1 All ER 531, [1953] 1 WLR 376; and see WILLS vol 50 (2005 Reissue) PARA 659.
- 11 *Re Mason, Mason v Mason* [1910] 1 Ch 695, CA; and see *Re Tredwell, Jeffray v Tredwell* [1891] 2 Ch 640 at 647, CA; *Re Barklie, M'Calmont v Barklie* [1917] 1 IR 1. It seems that where an annuity is bequeathed, after a husband's death, to his wife so long as she continues unmarried, a divorce may not prevent the wife from taking: *Knox v Wells* (1883) 48 LT 655; and see *Knox v Wells* (1864) 2 Hem & M 674; *sed quaere*.

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## 824. Conditions subsequent.

While limitations of annuities and rentcharges until marriage may be good, different results may follow from conditions subsequent in restraint of marriage, whether total or partial, attached to gifts of this kind<sup>1</sup>.

Sometimes annuities are given upon terms calculated to discourage one spouse from cohabiting with the other<sup>2</sup>, as, for instance, where a testator bequeaths an annuity to the annuitant to be paid only whilst living apart from his or her wife or husband<sup>3</sup>, or bequeaths a periodical sum to the annuitant with a direction that the sum is to be increased when living apart<sup>4</sup>. If the words referring to living apart should be read as a condition subsequent, the condition will be ignored as being contrary to public policy<sup>5</sup>. If, however, the words should be read as a limitation rather than a condition, as where the commencement and duration of the period during which the payment is to be made is fixed by reference to the living apart, the gift is void<sup>6</sup>.

The construction of covenants in separation deeds relating to the payment of annuities, and the effect on those provisions of subsequent reconciliation, are discussed elsewhere in this work<sup>7</sup>.

1 As to the distinction between a condition precedent and a condition subsequent see CONTRACT. It has been said that, according to English law, if a condition subsequent which is to defeat an estate is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift: *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116 at 129, CA, per Cotton LJ; and see *Reynish v Martin* (1746) 3 Atk 330 at 332 per Lord Hardwicke LC; *Brooke v Spong* (1846) 15 M & W 153; *Re Hewett, Eldridge v Iles* [1918] 1 Ch 458 at 463 per Younger J, where conditions subsequent in restraint of marriage are discussed and held to be only prima facie and not per se void. As to conditions in restraint of marriage see generally GIFTS vol 52 (2009) PARA 255; WILLS vol 50 (2005 Reissue) PARAS 423-428.

2 As to the duty of spouses to cohabit see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 216 et seq.

3 See eg *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116, CA. As to contracts for separation and settlements made in view of separation see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 710.

4 See eg *Brown v Peck* (1758) 1 Eden 140.

5 *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116 at 129, 131, CA; *Wren v Bradley* (1848) 2 De G & Sm 49, as explained in *Re Moore, Trafford v Maconochie* supra at 130 by Cotton LJ; see also *Bedborough v Bedborough (No 2)* (1865) 34 Beav 286. In *Nicholl v Jones* (1866) 36 LJ Ch 554, it was held that where a marriage settlement contained a grant of an annuity by the wife to the husband, a proviso for its cesser on the annuitant living apart from his wife was void.

6 *Re Moore, Trafford v Maconochie* (1888) 39 ChD 116, CA; see also *Re Hope Johnstone, Hope Johnstone v Hope Johnstone* [1904] 1 Ch 470, where the period was fixed by reference to cohabitation, and the limitation was held good. Where a wife had been deserted by her husband and the will apparently provided for her maintenance until he should come back, the gift was held good: *Re Charleton, Bracey v Sherwin* [1911] WN 54.

7 See generally MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(5) CAPITAL OR INCOME/825. Rentcharges.

## (5) CAPITAL OR INCOME

### 825. Rentcharges.

Whether created by will or deed, an ordinary rentcharge is by its nature a charge on the land itself and therefore on capital and this is so even though it is directed to be paid out of rents and profits. There is jurisdiction to order arrears to be raised by sale of the land<sup>1</sup>.

<sup>1</sup> *Hambro v Hambro* [1894] 2 Ch 564.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(5) CAPITAL OR INCOME/826. Annuities.

### 826. Annuities.

An annuity<sup>1</sup> may be either (1) a charge on the capital of property; (2) a continuing charge on income either unlimited or for the annuitant's life or other the duration of the annuity; or (3) a charge on the income only of the year in respect of which it is payable<sup>2</sup>.

The annuitant's rights in respect of arrears usually depend on the nature of the charge. The question whether an annuitant is entitled to have arrears satisfied out of capital or future

income is always one of the proper construction of the instrument creating the annuity and must accordingly depend in every case upon the precise language employed; no one case, therefore, can be said to govern another<sup>3</sup>. In some cases the words of the will have been held to amount to a clear charge on capital which does not admit of doubt<sup>4</sup>, but most cases are more difficult. The decisions on the subject may be conveniently grouped according to the form of the initial gift of the annuity. This may be (a) where the annuity is given by will, in the form of a simple gift of an annuity, followed usually by a residuary gift<sup>5</sup>; or (b) in the form of a direction to trustees to pay an annuity out of the income either of the testator's general estate or of a trust fund<sup>6</sup>.

1 The cases in which the legatee of an annuity has, according to the form in which the annuity has been created, the right to claim the value in cash are stated at paras 797-798 ante.

2 See PARA 828 post. Under Scottish law it seems that an annuity is payable out of capital in the absence of a clear indication of a contrary intention: *Colquhoun's Trustees v Colquhoun* 1922 SC 32.

3 *Re Collier's Deed Trusts*, *Collier v Collier* [1939] Ch 277, [1937] 3 All ER 292 at 293-294, CA. The reported cases upon the subject are numerous and not altogether reconcilable: *Re Collier's Deed Trusts*, *Collier v Collier* supra at 280 and at 293.

4 See *Howarth v Rothwell* (1862) 30 Beav 516; *Lazonby v Rawson* (1854) 4 De GM & G 556; *Pearson v Helliwell* (1874) LR 18 Eq 411 (cases of annuities charged on leaseholds). See also *Picard v Mitchell* (1851) 14 Beav 103; *Torre v Browne* (1855) 5 HL Cas 555; *Hickman v Upsall* (1860) 2 Giff 124 (annuity charged on debt); *Bell v Bell* (1872) IR 6 Eq 239; *Re Tucker*, *Tucker v Tucker* [1893] 2 Ch 323; *Re West's Estate* [1898] 1 IR 75, Ir CA (annuities charged on freeholds); *Re Cunningham*, *Dulcken v Cunningham* [1914] 1 Ch 427. On the other hand, annuities were held not to be charged on the capital of real estate in *Lambert v Turner* (1862) 11 WR 51; *Clifford v Arundell* (1859) 27 Beav 209; on appeal (1860) 1 De GF & J 307 (annuity created by deed).

5 See PARA 827 post.

6 See PARA 828 post.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(5) CAPITAL OR INCOME/827. Simple gift of annuity followed by residuary gift.

### **827. Simple gift of annuity followed by residuary gift.**

Where the initial gift of an annuity by will is in the form of a simple gift followed by a residuary gift, the general rule is that the annuitant must be paid in preference to the residuary legatee, who can take nothing until the annuitant has been paid in full<sup>1</sup>. In such cases the annuity is a charge on capital<sup>2</sup>.

The right of an annuitant claiming under an initial simple gift to have recourse to the capital of the residue is not taken away by a subsequent direction to trustees to pay the annuity out of income<sup>3</sup>; nor is such an annuitant's right of recourse to the general residue taken away by a direction to trustees to set apart a fund<sup>4</sup>, unless the will shows an intention, either express<sup>5</sup> or implied<sup>6</sup>, that, when the fund is set apart, the rest of the estate is to be discharged from the annuity<sup>7</sup>.

As a rule of practice (independent of construction), where an annuity is payable out of residue the court may set apart a sufficient fund to answer the annuity and pay the surplus residue to the residuary legatee<sup>8</sup>; but in such a case the annuitant, if necessary, may resort to the capital set apart<sup>9</sup>. The appropriation of a fund to answer the annuity does not discharge the rest of the testator's estate, either where the appropriation is by the court<sup>10</sup> or where it is made by the executor<sup>11</sup>.

1 *Re Tootal's Estate, Hankin v Kilburn* (1876) 2 ChD 628 at 633, CA; *Re Webb, Leedham v Patchett* (1890) 63 LT 545. As to the liability of the annuity or the residuary estate for an income fee payable to a trust corporation see eg *Re Hulton, Midland Bank Executor and Trustee Co Ltd v Thompson* [1936] Ch 536, [1936] 2 All ER 207; and see TRUSTS vol 48 (2007 Reissue) PARA 697.

2 See *Stamper v Pickering* (1838) 9 Sim 176; *Wroughton v Colquhoun* (1847) 1 De G & Sm 357; *Haynes v Haynes* (1853) 3 De GM & G 590; *Croly v Weld* (1853) 3 De GM & G 993; *Howarth v Rothwell* (1862) 30 Beav 516, where a note to the report contains a useful classification of cases in which annuities have been held payable out of capital or out of income. Cf *Re Richardson, Richardson v Richardson* [1915] 1 Ch 353; *Re Ellis, Nettleton v Crimmins* [1935] Ch 193.

3 *Re Mason, Mason v Robinson* (1878) 8 ChD 411. See also *Davies v Wattier* (1823) 1 Sim & St 463; *Picard v Mitchell* (1851) 14 Beav 103; *Pearson v Helliwell* (1874) LR 18 Eq 411.

4 *May v Bennett* (1826) 1 Russ 370; *Wright v Callender* (1852) 2 De GM & G 652; *Ingleman v Worthington* (1855) 25 LJ Ch 46; *Upton v Vanner* (1861) 1 Drew & Sm 594; *Percy v Percy* (1866) 35 Beav 295; *Re Mason, Mason v Robinson* (1878) 8 ChD 411 at 413; *Carmichael v Gee* (1880) 5 App Cas 588, HL; *Re Taylor, Illsley v Randall* (1884) 53 LJ Ch 1161; and see *Mills v Drewitt* (1855) 20 Beav 632; *Anderson v Anderson* (1863) 33 Beav 223; *Martin v Bostock* (1870) 23 LT 216. Where a will expressly provided that, if the income of the fund set aside should, from any cause or circumstance whatever, prove insufficient to answer the annuity, the deficiency should be made good out of the residue, the provision was held not to apply in favour of a purchaser of the annuity where the fund had been misapplied by the trustees: *Barnett v Sheffield* (1852) 1 De GM & G 371.

5 See eg *Re Street, Vevers v Holman* [1922] WN 291.

6 See *Kendall v Russell* (1830) 3 Sim 424, where the effect of the will was to be that, on the setting apart of the fund, the residue was released from liability; *Re Vesey, Bank of Ireland v Power* [1958] IR 268 at 274-275, 278-279, where the testator expressly provided that, in the case of deficiency of the income of a fund set aside to provide for one annuity, the capital should be used to make up the deficiency, and arrears of another annuity, in respect of which no such provision was made, were held to be payable out of accumulations of the income of the fund set aside to provide the annuity or refunds of income tax, but not out of the capital. As to the effect of a gift over of the sum set aside see eg *Tarbottom v Earle* (1863) 11 WR 680; and see PARA 828 note 9 post.

7 See *Re Owthwaite, Owthwaite v Taylor* [1891] 3 Ch 494 at 497.

8 See PARA 832 post.

9 *Harbin v Masterman* [1896] 1 Ch 351, CA. Arrears were paid out of the capital of the fund set apart in *Bright v Larcher* (1858) 3 De G & J 148; *Miner v Baldwin* (1853) 1 Sm & G 522; and see *Swallow v Swallow* (1831) 1 Beav 432n; *Hodge v Lewin* (1839) 1 Beav 431, where orders were made for the sale of so much of the capital as should be necessary for paying the annuities.

10 *Re Parry, Scott v Leak* (1889) 42 ChD 570 at 584; *Harbin v Masterman* [1896] 1 Ch 351 at 357, CA; *Davies v Wattier* (1823) 1 Sim & St 463. See *Re Evans and Bettell's Contract* [1910] 2 Ch 438 at 443, where Parker J pointed out that in so far as the estate consisted of realty which had been put up for sale it could be exonerated by paying the purchase money into court and obtaining an order under the Law of Property Act 1925 s 50; and see MORTGAGE vol 77 (2010) PARA 101 et seq; SALE OF LAND. As to the power of personal representatives to convey a legal estate to a purchaser free of equitable interests see PARA 770 ante; and EXECUTORS AND ADMINISTRATORS; REAL PROPERTY vol 39(2) (Reissue) PARA 250.

11 *Gordon v Bowden* (1822) 6 Madd 342; and see *Charitable Bequests Comrs v St Lawrence* (1846) 3 Jo & Lat 561, where the interest on government stock set aside to answer an annuity was reduced and a further sum was ordered to be set aside.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(5) CAPITAL OR INCOME/828. Direction to pay annuity out of income of a fund.

## **828. Direction to pay annuity out of income of a fund.**

Where there is a trust to pay an annuity out of the income of a trust fund, there are at least four possible constructions, namely (1) that the annuity in each year is payable solely out of the income of that year, that is, is absolutely non-cumulative; (2) that the annuity is payable out of income down to some defined date, that is, is cumulative to a limited extent; (3) that the annuity is payable out of income generally, that is, is cumulative indefinitely; or (4) that the annuity is ultimately charged on and payable out of capital<sup>1</sup>. Further, an annuity is not to be treated as non-cumulative unless it is clearly shown to be so and an annuity can be partially cumulative without being indefinitely cumulative<sup>2</sup>. For practical purposes a continuing charge on income not limited in time is in general equivalent to a charge on capital<sup>3</sup>.

If the capital of the estate or fund is given not merely subject to the trust for payment of the annuity, but is given subject to the payment of the annuity or expressions to a like effect are used<sup>4</sup>, this indicates that the capital is only to be taken on the terms that the annuity is to be paid in full, and the annuity is charged on capital<sup>5</sup>. If the annuity is made payable out of the income of the trust fund without any subsequent indication that it is to be paid in full and without any express words confining the annuity for any one year to the income for that year, the annuity is, *prima facie*, a continuing charge on income<sup>6</sup> and the annuitant, or his personal representative after his death, will be entitled to have the income impounded until all arrears of the annuity are paid<sup>7</sup>. Sometimes this right only extends to the income arising during a limited period, such as the annuitant's life<sup>8</sup>. This is the case where a trust is expressed to take effect at the expiration of that period in terms that show that the whole fund, both capital and future income, is, at that moment, to go over to another person intact<sup>9</sup>. In the absence of any such indication, the right to have the income applied in satisfaction of the arrears will continue until the arrears are satisfied; and, where an annuity is a continuing charge on the income of a fund, the annuitant is in strictness entitled to require that the surplus income in any year, after keeping down the current instalments of the annuity and any existing arrears, is within the limits permissible by law to be accumulated for the purpose of meeting the subsequent instalments<sup>10</sup>. As that is the right of an annuitant whose annuity is a continuing charge on income, any directions in the instrument creating the annuity which are inconsistent with that right indicate that the annuity is not meant to be so charged<sup>11</sup>. This will be the case whenever the instrument provides that any surplus income in any year after meeting the current instalment of the annuity is to be paid or applied for the benefit of other persons; accordingly in such a case the charge will be limited to the income only of the current year<sup>12</sup>, save where the provision may be construed as charging the income of any year not only with the annuity in respect of that year but also with any deficiency in any year or years past<sup>13</sup>. As the incidence of a continuing charge on income, if strictly applied, may be very inconvenient, the courts have sometimes been reluctant to construe a will as creating a continuing charge if the charge can be construed as limited to the income of the current year<sup>14</sup>.

1 See *Re Rose, Rose v Rose* (1915) 113 LT 142 at 144; *Re Chance's Will Trusts, Westminster Bank Ltd v Chance* [1962] Ch 593 at 599, [1962] 1 All ER 942 at 946. Cf *Re Coller's Deed Trusts, Coller v Coller* [1939] Ch 277 at 280-281, [1937] 3 All ER 292 at 294, CA. Although most of the cases in which the question has been considered have related to wills, it seems that, in determining the question, similar principles apply whether the annuity is granted by deed or will: cf *Re Coller's Deed Trusts, Coller v Coller* supra at 280-282 and at 294-295, where the principles stated in relation to annuities payable out of the income of trust funds are treated as being generally applicable; but see *Re Cochrane, Royal Bank of Ireland Ltd v Brooke-Alder* [1953] IR 160 at 175, where it is pointed out that the rules of construction of settlements are rather more rigid than the rules of construction of wills.

2 See *Re Chance's Will Trusts, Westminster Bank Ltd v Chance* [1962] Ch 593 at 600, [1962] 1 All ER 942 at 946, where annuities were held to be a continuing charge on income to the extent that the income of any year was charged with the annuities due in respect of that year and any deficiency in any year or years then past, but was not charged in respect of any possible or apprehended deficiency in any future year.

3 *Re Coller's Deed Trusts, Coller v Coller*, as reported in [1939] Ch 277 at 279, CA; *Phillips v Gutteridge* (1862) 3 De GJ & Sm 332; *Re Young, Brown v Hodgson* [1912] 2 Ch 479 at 486.

4 See eg *Phillips v Gutteridge* (1862) 3 De GJ & Sm 332 (gift over of capital, or such part of it as might remain undisposed of, after performance or failure of antecedent trusts), followed in *Re Buchanan, Stephens v Draper* [1915] 1 IR 95.

5 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 281, [1937] 3 All ER 292 at 294, CA; *Re London, Brighton and South Coast Rly Co, ex p Wilkinson* (1849) 3 De G & Sm 633; *Playfair v Cooper, Prince v Cooper* (1853) 17 Beav 187; *Perkins v Cooke* (1862) 2 John & H 393 (disapproving *Boyd v Buckle* (1840) 10 Sim 595); *Birch v Sherratt* (1867) 2 Ch App 644, CA; *Re Howarth, Howarth v Makinson* [1909] 2 Ch 19, CA; *Re Watkin's Settlement, Wills v Spence* [1911] 1 Ch 1, CA (a case of an annuity granted by deed; disapproving *Re Bigge, Granville v Moore* [1907] 1 Ch 714); *Re Young, Brown v Hodgson* [1912] 2 Ch 479 (disapproving *Taylor v Taylor, Re Taylor's Estate Act* (1874) LR 17 Eq 324); and see *Booth v Coulton* (1870) 5 Ch App 684; *Re Rose, Rose v Rose* (1915) 113 LT 142, where annuities were held to be a continuing charge on income. Cf *Hindle v Taylor* (1855) 20 Beav 109; revsd on another point 5 De GM & G 577.

6 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 281, [1937] 3 All ER 292 at 294, CA; and see *Phillips v Gutteridge* (1862) 3 De GJ & Sm 332 at 337; *Re Howarth, Howarth v Makinson* [1909] 2 Ch 19 at 21, CA; *Re Buchanan, Stephens v Draper* [1915] 1 IR 95 at 109-110.

7 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 281, [1937] 3 All ER 292 at 294, CA; and see *Forbes v Richardson* (1853) 11 Hare 354.

8 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 281, [1937] 3 All ER 292 at 294, CA; and see *Salvin v Weston* (1866) 14 WR 757; *Wormald v Muzeen* (1881) 50 LJ Ch 776, CA; *Re Cochrane, Royal Bank of Ireland Ltd v Brooke-Alder* [1953] IR 160.

9 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 281, [1937] 3 All ER 292 at 294, CA; *Foster v Smith* (1846) 1 Ph 629; *Re Boden, Boden v Boden* [1907] 1 Ch 132, CA; *Re Boulcott's Settlement, Wood v Boulcott* (1911) 104 LT 205 (annuity created by deed); and see *Philipps v Philipps* (1844) 8 Beav 193; *Earle v Bellingham* (1857) 24 Beav 445; *Baker v Baker* (1858) 6 HL Cas 616; *Tarbottom v Earle* (1863) 11 WR 680; *Sheppard v Sheppard* (1863) 32 Beav 194; *Mitchell v Wilton* (1875) LR 20 Eq 269 (cases where annuities were held not to be charged on capital); *Scott v Salmond* (1833) 1 My & K 363; *A-G v Poulden* (1844) 3 Hare 555 (cases where surviving annuitants were held not to be entitled to be paid out of income released by the death of other annuitants). Cf *Re Mackenzie's Settlement* (1863) 32 Beav 253 (annuities created by deed) where, on the construction of the settlement, surviving annuitants were held to be entitled to be paid in full on the release of income by the death of other annuitants).

10 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 281-282, [1937] 3 All ER 292 at 294-295, CA; *Re Street, Vevers v Holman* [1922] WN 291. Retention of the income, however, after the expiration of the statutory period of 21 years does not contravene the Law of Property Act 1925 s 164(1) (see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1123): see *Re Earl of Berkeley, Inglis v Countess of Berkeley* [1968] Ch 744 at 774, [1968] 3 All ER 364 at 379, CA, where the dictum of Romer LJ implying the contrary in *Re Collier's Deed Trusts, Collier v Collier* supra at 282 and at 294-295 was not followed, and *Re Robb, Marshall v Marshall* [1953] Ch 459, [1953] 1 All ER 920 and *Re Nash, Miller v Allen* [1965] 1 All ER 51, [1965] 1 WLR 221 were overruled.

11 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 282, [1937] 3 All ER 292 at 295, CA.

12 *Re Collier's Deed Trusts, Collier v Collier* [1939] Ch 277 at 282, [1937] 3 All ER 292 at 295-296, CA (annuity granted by deed) (following *Stelfox v Sugden* (1859) John 234); *Re Carey, Wardle v Carey* [1950] 1 All ER 726; and see *Miller v Huddleston* (1851) 3 Mac & G 513. The charge has been held to be similarly limited where the annuity in question was payable only subject to the income of the trust fund being first applied to the payment of another annuity which was expressly charged on capital (*Re Griffiths, Haworth v Welton* [1945] 1 All ER 610, CA); where the gift was of a share in the income of the trust fund, which share, if below a specified sum in any year, was to be made up to that sum 'in respect of that year', and these were dispositions of income and capital subject to the annuitant's interest in 'part of the income' (*Re Cameron, Currie v Milligan* [1955] 1 All ER 424, [1955] 1 WLR 140, CA); and where the annuity was payable out of the rents of leaseholds and there was a disposition of the surplus rents during the annuitant's life and a direction for the sale of the leaseholds, and a disposition of the proceeds, on her death (*Darbon v Rickards* (1845) 14 Sim 537).

13 See note 2 supra.

14 Cf *Re Cameron, Currie v Milligan* [1954] 3 All ER 329 at 332, [1954] 1 WLR 1375 at 1377, 1378; affd [1955] 1 All ER 424, [1955] 1 WLR 140, CA; *Re Chance's Will Trusts, Westminster Bank Ltd v Chance* [1962] Ch 593 at 599-600, [1962] 1 All ER 942 at 946.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(5) CAPITAL OR INCOME/829. Distribution of surplus income.

### **829. Distribution of surplus income.**

Even where the annuity is a charge on the capital of a fund there is authority for the view that at least as a matter of administrative relaxation an achieved surplus of income may be allowed to be distributed to the persons entitled subject to the annuity<sup>1</sup>. When a deficiency of income to keep up an annuity has been met out of capital, there is no right to use a subsequent surplus of income to recoup capital<sup>2</sup>. Where an annuity charged on capital is in arrear, the available income should first be applied towards the payment of the annuity in respect of the current year and any deficiency should be met out of capital. Payments on account should be treated accordingly<sup>3</sup>.

1 *Re Platt, Sykes v Dawson* [1916] 2 Ch 563, explained in *Re Coller's Deed Trusts, Coller v Coller* [1939] Ch 277 at 284, [1937] 3 All ER 292 at 296, CA; *Re Cameron, Currie v Milligan* [1955] 1 All ER 424, [1955] 1 WLR 140, CA.

2 *Re Earl of Berkeley, Inglis v Countess of Berkeley* [1968] Ch 744, [1968] 3 All ER 364; *Re Croxton, Ferrers v Croxton* [1915] 2 Ch 290; *Playfair v Cooper* (1853) 17 Beav 187.

3 *Re Lord Westbury's Settlement, Westmacott v Bethell* [1944] Ch 4, [1943] 2 All ER 463.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/2. CREATION, DURATION AND CHARGE/(5) CAPITAL OR INCOME/830. Tenant for life and remainderman.

### **830. Tenant for life and remainderman.**

Where a testator bequeaths annuities and other legacies and by the same will settles the residue upon a tenant for life and remainderman, the general rule is that, as between tenant for life and remainderman, the other legacies are payable out of capital and the annuities out of income<sup>1</sup>. This rule also applies where the property so settled was itself subject to an annuity and the testator was under no personal liability to pay the annuity<sup>2</sup>. If, however, the testator was himself liable as a debtor, the payments should be apportioned<sup>3</sup> between income and capital, although the precise method to be employed is in the court's discretion<sup>4</sup>.

1 See *Scholefield v Redfern* (1863) 2 Drew & Sm 173 at 180; *Revel v Watkinson* (1748) 1 Ves Sen 93 (jointure). Note that, subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65.

2 *Re Darby, Russell v MacGregor* [1939] Ch 905, [1939] 3 All ER 6, CA, following *Re Popham, Butler v Popham* (1914) 111 LT 524, and overruling on this point *Re Thompson, Thompson v Watkins* [1908] WN 195. The rule in *Allhusen v Whittell* (1867) LR 4 Eq 295 has no application where the testator and his estate were not liable for payment of the annuity: *Re Darby, Russell v MacGregor* supra.

3 Ie under the rule in *Allhusen v Whittell* (1867) LR 4 Eq 295: see EXECUTORS AND ADMINISTRATORS.

4 *Re Poyser, Landon v Poyser* [1910] 2 Ch 444 at 448; and see EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(1) ADMINISTRATION OF ESTATES/(i) Solvent Estates/831. Effect of partial intestacy.

### **3. PAYMENT AND REMEDIES**

#### **The National Assembly for Wales and the Welsh Ministers; transfer of functions**

As to the transfer of functions to the National Assembly for Wales and the Welsh Ministers, see the introductory note to this title.

### **(1) ADMINISTRATION OF ESTATES**

#### **(i) Solvent Estates**

##### **831. Effect of partial intestacy.**

If, having bequeathed an annuity, a testator dies solvent and partially intestate, then unless the will otherwise provides the annuity will be primarily payable, with other pecuniary legacies, out of the property of which the testator has not effectively disposed by will<sup>1</sup>.

<sup>1</sup> See the Administration of Estates Act 1925 ss 33(2), 34(3), Sch 1 Pt II (paras 1-8(a)) (s 33(2) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 5(1), (3)); and see *Re Gillett's Will Trusts, Barclays Bank Ltd v Gillett* [1950] Ch 102, [1949] 2 All ER 893; *Re Midgley, Barclays Bank Ltd v Midgley* [1955] Ch 576 at 584, [1955] 2 All ER 625 at 629. For a decision to the contrary see *Re Beaumont's Will Trusts, Walker v Lawson* [1950] Ch 462, [1950] 1 All ER 802 (criticised in *Re Midgley, Barclays Bank Ltd v Midgley* supra; and *Re Berrey's Will Trusts, Greening v Warner* [1959] 1 All ER 15, [1959] 1 WLR 30). See further EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(1) ADMINISTRATION OF ESTATES/(i) Solvent Estates/832. Fund out of which testamentary annuity is payable.

##### **832. Fund out of which testamentary annuity is payable.**

Although certain references to legacies (which include annuities<sup>1</sup>) are contained in the statutory provisions<sup>2</sup> which lay down the order in which the estate of a person dying after 1925 is, if solvent, to be applied in the payment of debts, those provisions do not alter the old rule<sup>3</sup> that, as between realty and personality, personality is primarily liable for legacies, including annuities, in the absence of other provision in the will<sup>4</sup>. Annuities may, however, be given so as to be payable out of real estate solely<sup>5</sup> or primarily<sup>6</sup>. Where they are payable solely out of real estate, they are really rentcharges. If there are several annuities and the sole source of payment proves insufficient, the annuities will abate rateably<sup>7</sup>. On construction both real estate and personal estate may be liable rateably<sup>8</sup>.

The principles applicable in determining whether an annuity is a charge on capital, a continuing charge on income or a limited charge on income, and in determining how far, as between a tenant for life and remainderman, an annuity is payable out of income or capital, have been previously mentioned<sup>9</sup>.

<sup>1</sup> See the Administration of Estates Act 1925 s 55(1)(ix).



2 See *ibid* s 34(3), Sch 1 Pt II paras 1, 2: see EXECUTORS AND ADMINISTRATORS.

3 See *Bench v Biles* (1819) 4 Madd 187 at 188; *Davis v Gardiner* (1723) 2 P Wms 188; *Fitzgerald v Field* (1826) 1 Russ 416 at 430; *Brown v Claxton* (1829) 3 Sim 225; *Davies v Ashford* (1845) 15 Sim 42; *Re Cameron, Nixon v Cameron* (1884) 26 ChD 19, CA; *Re Boards, Knight v Knight* [1895] 1 Ch 499; and EXECUTORS AND ADMINISTRATORS.

4 See *Re Thompson, Public Trustee v Husband* [1936] Ch 676, [1936] 2 All ER 141; *Re Rowe* [1941] Ch 343; and see EXECUTORS AND ADMINISTRATORS; and Williams, Mortimer and Sunnocks *Executors, Administrators and Probate* (17th Edn) p 989 et seq.

5 *Lomax v Lomax* (1849) 12 Beav 285; *Ion v Ashton* (1860) 28 Beav 379; *Sinnett v Herbert* (1871) LR 12 Eq 201 at 206; *Woodhead v Turner* (1851) 4 De G & Sm 429; *Poole v Heron* (1873) 42 LJ Ch 348.

6 See eg *Dickin v Edwards* (1844) 4 Hare 273 at 276 per Wigram V-C; and see EXECUTORS AND ADMINISTRATORS.

7 *Fitzgerald v O'Connell* (1861) 11 I Ch R 437; *Miller v Huddleston* (1851) 3 Mac & G 513. As to the abatement of annuities see also PARAS 797-798 ante; and EXECUTORS AND ADMINISTRATORS.

8 See *Young v Hassard* (1844) 1 Jo & Lat 466, where freeholds and leaseholds contributed rateably; and see EXECUTORS AND ADMINISTRATORS.

9 See PARA 826 et seq ante.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(1) ADMINISTRATION OF ESTATES/(i) Solvent Estates/833. Position where realty and personalty given together.

### **833. Position where realty and personalty given together.**

Where the real and personal estates are disposed of together several distinctions have been drawn. Where the real estate is directed to be sold and there is a direction to pay an annuity out of the mixed fund, the real and personal estates are liable rateably<sup>1</sup>, and the effect is the same where the proceeds of the real estate are directed to be part of the personal estate<sup>2</sup>. On the other hand, where the real estate is directed to be sold, but there is no direction to pay out of the mixed fund, the personal estate is primarily liable<sup>3</sup>.

Where the real and personal estates are disposed of together, but the real estate is not directed to be sold, the personal estate, as a rule, remains primarily liable to pay the annuity<sup>4</sup>. In certain cases, however, the real and personal estates, on construction, may be held rateably liable<sup>5</sup>. The rule of rateable liability may be applied where the real estate is not directed to be sold, but the testator has shown an intention of creating a mixed fund of realty and personalty<sup>6</sup>. Again the primary liability, on construction, may be thrown on the real estate, the general personal estate being secondarily liable<sup>7</sup>.

1 *Roberts v Walker* (1830) 1 Russ & M 752; *Dunk v Fenner* (1831) 2 Russ & M 557; *Bedford v Bedford* (1865) 35 Beav 584; *Re Spencer Cooper, Poë v Spencer Cooper* [1908] 1 Ch 130; and see EXECUTORS AND ADMINISTRATORS.

2 *Simmons v Rose* (1856) 6 De GM & G 411.

3 *Re Boards, Knight v Knight* [1895] 1 Ch 499; *Elliott v Dearsley* (1880) 16 ChD 322, CA. This rule has not been affected by the Administration of Estates Act 1925 s 34(3), Sch 1 Pt II (paras 1-8(a)); see *Re Thompson, Public Trustee v Husband* [1936] Ch 676 at 682, [1936] 2 All ER 141 at 145; and see PARA 832 ante; and EXECUTORS AND ADMINISTRATORS.

4 *Boughton v Boughton, Boughton v James* (1848) 1 HL Cas 406 at 437; *Tench v Cheese* (1855) 6 De GM & G 453 at 467; *Roberts v Roberts* (1843) 13 Sim 336; *Re Ovey, Broadbent v Barrow* (1885) 31 ChD 113.

5 *Falkner v Grace* (1851) 9 Hare 280 at 282; *Howard v Dryland* (1877) 38 LT 24.

6 *Allan v Gott* (1872) 7 Ch App 439; *Boughton v James* (1844) 1 Coll 26.

7 *Paget v Huish* (1863) 1 Hem & M 663 (where the authorities are classified at 668, 671); *Mann v Copland* (1817) 2 Madd 223. Cf *Re Trenchard*, *Trenchard v Trenchard* [1905] 1 Ch 82.

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### **834. Annuities created by deed.**

Where, under a marriage settlement from which the deceased settlor's personal estate receives no benefit, a jointure is secured on land and also by the settlor's covenant, the land is the primary source of payment<sup>1</sup>.

Again, where an annuity granted for money value and secured by covenant is also by the deed charged on any property, the property is, as between the persons claiming under the deceased grantor, primarily liable<sup>2</sup>.

1 *Lanoy v Duke and Duchess of Athol* (1742) 2 Atk 444; *Loosemore v Knapman* (1853) Kay 123.

2 See the Administration of Estates Act 1925 s 35; and EXECUTORS AND ADMINISTRATORS. Section 35 applies in the case of the estate of a person dying after 1925: s 54. As regards estates of persons dying before 1926, the Real Estate Charges Act 1854, the Real Estate Charges Act 1867 and the Real Estate Charges Act 1877 (all repealed as to deaths after 1925) contained similar provisions, but only applied to charges on land: see *Re Sharland*, *Kemp v Rozey (No 2)* (1896) 74 LT 664, CA. Before the last-mentioned Acts the rule was different: *Young v Furse* (1855) 20 Beav 380; *Re Muffet*, *Jones v Mason* (1888) 39 ChD 534 at 537.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(1) ADMINISTRATION OF ESTATES/(i) Solvent Estates/835. Marshalling.

### **835. Marshalling.**

If a rentcharge is charged by will on land already subject to a mortgage, the owner of the rentcharge may be entitled to have the assets marshalled and to throw the mortgage on the personal estate<sup>1</sup>.

1 *Re Fry*, *Fry v Fry* [1912] 2 Ch 86; *Buckley v Buckley* (1888) 19 LR Ir 544. As to the doctrine of marshalling see generally EQUITY vol 16(2) (Reissue) PARAS 758-763; MORTGAGE vol 77 (2010) PARA 101 et seq.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(1) ADMINISTRATION OF ESTATES/(ii) Insolvent Estates/836. Priority of debts and liabilities in insolvent estates.

## **(ii) Insolvent Estates**

### **836. Priority of debts and liabilities in insolvent estates.**

In the case of deaths on or after 29 December 1986<sup>1</sup> the law is laid down by the Insolvency Act 1986<sup>2</sup> and orders made thereunder<sup>3</sup>. In most cases administration of the insolvent estate will be carried out by the personal representatives out of court, but it may also be carried out under the direction of the court in an administration action, or in bankruptcy following an insolvency administration order made by the bankruptcy court. In each case the reasonable funeral, testamentary and administration expenses have priority. In general where the estate of a deceased person is insolvent and is being administered otherwise than in bankruptcy, the same provisions as may be in force for the time being under the law of bankruptcy with respect to the assets of individuals adjudged bankrupt apply to the administration of the estate with respect to the respective rights of secured and unsecured creditors, to debts and liabilities provable, to the valuation of future and contingent liabilities and to the priorities of debts and other payments<sup>4</sup>. However the rule<sup>5</sup> restricting a landlord's right of distress to six months' rent accrued due before the commencement of the bankruptcy seems only to apply to administration in bankruptcy<sup>6</sup>.

1 In the administration of the estate of a person who died insolvent after 1925 and before 29 December 1986, the funeral, testamentary and administration expenses have priority, and subject to that the same rules prevail and are observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priority of debts and liabilities, as are in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt: see the Administration of Estates Act 1925 s 34(1), Sch 1 Pt I paras 1, 2 (repealed); and EXECUTORS AND ADMINISTRATORS.

2 See the Insolvency Act 1986 s 421; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 823.

3 See the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 824 et seq.

4 The Insolvency Act 1986 s 292(2) (which provides that no person may be appointed as trustee of a bankrupt's estate unless he is, at the time of the appointment, qualified to act as an insolvency practitioner in relation to the bankrupt) does not apply: Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 4(2); and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 831.

5 In the Insolvency Act 1986 s 347(1): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 686.

6 See the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999, art 3(1), Sch 1 Pt II para 28; and *Re Fryman's Estate* (1888) 38 ChD 468; *Re Wells* [1929] 2 Ch 269.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(1) ADMINISTRATION OF ESTATES/(ii) Insolvent Estates/837. Annuitant's rights as creditor.

### **837. Annuitant's rights as creditor.**

So long as an annuity granted by a deceased person in his lifetime is paid, the annuitant is not a creditor even where it is shown that the estate of the deceased is insufficient to meet liabilities, including the estimated value of the annuity. Consequently, an annuitant whose annuity is not in arrear cannot obtain an administration judgment, even though his annuity is expressed to accrue from day to day<sup>1</sup>; but if a judgment has been obtained by another person as a creditor he is allowed to prove, provided he can show that if the annuity continues for its normal period the estate will not suffice to meet the debts and annuity in full<sup>2</sup>.

1 *Re Hargreaves, Dicks v Hare* (1890) 44 ChD 236 at 239, CA; *Westminster Bank Ltd v IRC* [1954] 1 All ER 240 at 242; and see EXECUTORS AND ADMINISTRATORS. As to the right of the legatee of an annuity to obtain an administration judgment see PARA 885 et seq post.

2 *Re Pink, Elvin v Nightingale* [1927] 1 Ch 237.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(1) ADMINISTRATION OF ESTATES/(ii) Insolvent Estates/838. Rights of personal representatives.

### **838. Rights of personal representatives.**

Formerly, a personal representative had the right to retain the amount of all arrears owing to him in respect of his annuity<sup>1</sup>. However, the right of a personal representative to retain was abolished as from 1 January 1972<sup>2</sup>. If the estate is insolvent, a personal representative must prove for the value of his annuity like an ordinary creditor<sup>3</sup>. If an executor is indebted to the estate an annuity bequeathed to him will be applied in payment of the debt<sup>4</sup>.

1 *Re Beeman, Fowler v James* [1896] 1 Ch 48.

2 See the Administration of Estates Act 1971 ss 10(1), 12(6), 14(2); and EXECUTORS AND ADMINISTRATORS.

3 See *Re Beeman, Fowler v James* [1896] 1 Ch 48.

4 *Skinner v Sweet* (1818) 3 Madd 244. As to the appointment of a debtor as executor see EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(2) APPORTIONMENT/(i) Apportionment in respect of Time/839. General rule.

## **(2) APPORTIONMENT**

### **(i) Apportionment in respect of Time**

#### **839. General rule.**

Unless it is expressly stipulated that no apportionment is to take place<sup>1</sup>, all rent<sup>2</sup>, annuities and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, are to be considered as accruing from day to day and are apportionable in respect of time accordingly<sup>3</sup>.

The apportioned part becomes payable or recoverable, in the case of a continuing rentcharge or annuity, when the entire portion of which the apportioned part forms part becomes due and payable, and not before; and in the case of a rentcharge or annuity determined by re-entry, death or otherwise, when the next entire portion would have been payable if the same had not been so determined, and not before<sup>4</sup>.

All persons have the same remedies for recovering the apportioned parts, when payable, as they would have had for recovering the entire portions if they had been entitled to them<sup>5</sup>. However, neither the persons liable to pay rents reserved out of or charged on hereditaments of any tenure, nor the hereditaments, are to be resorted to for any apportioned part forming

part of an entire or continuing rent specifically; but the entire or continuing rent, including the apportioned part, is to be recovered and received by the person who, if the rent had not been apportionable under the above provisions, or otherwise, would have been entitled to the entire or continuing rent, and the apportioned part is recoverable from that person by the executors or other parties entitled under the above provisions to the apportioned part<sup>6</sup>.

1 See PARA 840 post.

2 As to the inclusion of rentcharges and rents seek within the meaning of 'rent' for this purpose see PARA 755 ante.

3 Apportionment Act 1870 s 2 (amended by the Statute Law Revision (No 2) Act 1893); see also *Harvey v Harvey* (1915) 50 ILT 12. As to an annuity payable for the maintenance of a wife under a separation deed see EQUITY vol 16(2) (Reissue) PARA 456; MATRIMONIAL AND CIVIL PARTNERSHIP LAW. As to the operation of the Apportionment Act 1870 in relation to rent payable by tenants to landlords under leases or tenancy agreements see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 278 et seq; and as to the operation of that Act as between tenant for life and remainderman see SETTLEMENTS. As to the rules of common law and equity with respect to apportionment see EQUITY vol 16(2) (Reissue) PARA 456.

4 See the Apportionment Act 1870 s 3.

5 See *ibid* s 4.

6 See *ibid* s 4 proviso.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(2) APPORTIONMENT/(i) Apportionment in respect of Time/840. Cases of no apportionment.

#### **840. Cases of no apportionment.**

The statutory rules as to apportionment<sup>1</sup> do not extend to any case in which it is expressly stipulated that no apportionment is to take place<sup>2</sup>, provided the express stipulation is contained in the will or other instrument of gift<sup>3</sup>. The rules do not apply to an annuity payable in advance<sup>4</sup>.

1 As to these rules see PARA 839 ante.

2 Apportionment Act 1870 s 7; *Re Meredith, Stone v Meredith* (1898) 78 LT 492.

3 *Re Oppenheimer, Oppenheimer v Boatman* [1907] 1 Ch 399, where dividends not apportionable under the company's articles were held apportionable as between persons interested in the testator's estate. This decision was followed in *Re Muirhead, Muirhead v Hill* [1916] 2 Ch 181; *Re Edwards, Newbery v Edwards* [1918] 1 Ch 142. See further SETTLEMENTS.

4 *Trevalion v Anderton* (1897) 66 LJQB 489, CA.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(2) APPORTIONMENT/(i) Apportionment in respect of Time/841. Apportionment on sale.

#### **841. Apportionment on sale.**

On the sale of a rentcharge, the contract usually provides for apportionment in respect of time as between the vendor and purchaser<sup>1</sup>. If instalments of the rentcharge are in arrear, they

should be expressly dealt with by the conveyance, otherwise they will not pass to the purchaser<sup>2</sup>.

1 As to the sale of rentcharges see generally SALE OF LAND.

2 See *Mirehouse v Rennell* (1833) 8 Bing 490 at 494, HL; *Flight v Bentley* (1835) 7 Sim 149 at 151; *Salmon v Dean* (1851) 3 Mac & G 344 at 346.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(2) APPORTIONMENT/(ii) Apportionment in respect of Space/A. LEGAL APPORTIONMENT/842. Legal apportionment by agreement or implication of law.

## **(ii) Apportionment in respect of Space**

### **A. LEGAL APPORTIONMENT**

#### **842. Legal apportionment by agreement or implication of law.**

A rentcharge is entire and issues out of every portion of land charged<sup>1</sup>. Unless the rentcharge has been legally apportioned, the owner of the rentcharge may have recourse to any one portion of the land for recovering the whole of any one instalment<sup>2</sup>.

By agreement between the owner of a rentcharge and the owner or owners of the land on which it is charged, the rentcharge may be apportioned between different portions of the land or charged exclusively on a portion of the land in exoneration of the remainder<sup>3</sup>.

In some cases there may without express agreement be a legal apportionment by virtue of which the owner of part of the land charged is only liable for an apportioned part. Accordingly, if a person having a good title to one property and a defective title to another property grants both properties to another person, reserving in his own favour a rentcharge issuing out of both and the grantee is subsequently evicted from the property to which the grantor had a defective title, the rentcharge will be apportioned, and the grantee will only be liable for an apportioned part<sup>4</sup>. If, however, instead of reserving a rentcharge to himself that person grants a rentcharge to a third person and is subsequently evicted from the property to which he had the defective title, the other property will after eviction remain charged with the whole rent, for the grantor cannot take advantage of the weakness of his own estate<sup>5</sup>.

Where a rentcharge belonging to a person issues out of two properties, if one property descends to that person the other property will only remain liable to an apportioned part of the rent<sup>6</sup>.

An apportionment of a rentcharge may result from a statute<sup>7</sup>. On the acquisition under compulsory powers of part only of land subject to a rentcharge, special provisions apply with regard to the apportionment of the rentcharge or the release of the land acquired from the charge<sup>8</sup>.

1 *Woodcock v Titterton* (1864) 12 WR 865. See also *Conolly v Gorman* [1898] 1 IR 20, 1r CA; *Mills v Cobb* (1866) LR 2 CP 95 at 99.

2 See *Christie v Barker* (1884) 53 LJQB 537 at 543, CA; Gilbert on Rents 152.

3 At common law such a release had the effect of extinguishing the entire rentcharge, but the release of part of a rentcharge has been made effective by statute: see the Law of Property Act 1925 s 70; and PARA 893 post.

4 *Hartley v Maddocks* [1899] 2 Ch 199. Cf *Mitchell v Mosley* [1914] 1 Ch 438, CA.

- 5 Co Litt 148b. Cf *Roche v Jordan* [1896] 1 IR 494.
- 6 1 Roll Abr 236. As to the result where the owner of a rentcharge becomes the owner of the property charged see PARA 895 post.
- 7 *Sansom v St Leonard, Shoreditch Vestry* (1869) LR 4 CP 654.
- 8 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 696, 709, 710.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(2) APPORTIONMENT/(ii) Apportionment in respect of Space/A. LEGAL APPORTIONMENT/843. Basis of apportionment.

### **843. Basis of apportionment.**

Where in the cases previously mentioned<sup>1</sup> there must be an apportionment, the basis of the apportionment should not be the acreage of the several parts of the land, but should be their relative values<sup>2</sup>.

Where a testator charges freeholds and leaseholds with a rentcharge<sup>3</sup>, and disposes separately of the several properties, they are liable to contribute to the rentcharge in proportion to their respective annual values at the testator's death<sup>4</sup>.

1 See PARA 842 ante.

2 *Ewer v Moyle* (1600) Cro Eliz 771; *Smith v Malings* (1608) Cro Jac 160; *Hartley v Maddocks* [1899] 2 Ch 199 at 203; *Allison v Jenkins* [1904] 1 IR 341; *Salts v Battersby* [1910] 2 KB 155. See also the rules as to apportionment of rent service mentioned in LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 278 et seq; and Gilbert on Rents 189. The date at which the value is to be taken may vary in different cases.

3 Ie so far only as not prohibited, as from 22 August 1977, by the Rentcharges Act 1977 s 2 (as amended): see PARA 774 ante.

4 *Young v Hassard* (1844) 1 Jo & Lat 466; and see *Fielding v Preston* (1857) 1 De G & J 438. Cf *Ley v Ley* (1868) LR 6 Eq 174, where two freehold properties, one mineral and the other agricultural, were by settlement charged with a rentcharge and were held liable to contribute to it in proportion to actual income from year to year and not in proportion to the capitalised values.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(2) APPORTIONMENT/(ii) Apportionment in respect of Space/B. GENERAL STATUTORY POWER OF APPORTIONMENT/844. Application for apportionment.

## **B. GENERAL STATUTORY POWER OF APPORTIONMENT**

### **844. Application for apportionment.**

The owner<sup>1</sup> of any land<sup>2</sup> which is affected by a rentcharge<sup>3</sup> which also affects land not in his ownership may apply to the Secretary of State<sup>4</sup> for an order apportioning the rentcharge<sup>5</sup> between his land and the remaining land affected by the rentcharge<sup>6</sup>. Application may also be made by the owner of land affected by a rentcharge which does not affect other land not in his ownership for an order apportioning the rentcharge between such parts of his land as may be specified in the application<sup>7</sup>. However, no such application may be made for apportionment in respect of (1) a rentcharge under any Act of Parliament providing for the creation of

rentcharges in connection with the execution of works on land or the commutation of any obligation to do such work, or a rentcharge which is, by virtue of any enactment or agreement or by custom, charged on or otherwise payable in relation to land wholly or partly in lieu of tithes<sup>8</sup>; or (2) land affected by a rentcharge which also affects other land, if the whole of that other land is exonerated or indemnified from the whole of the rentcharge by means of a charge on the first-mentioned land<sup>9</sup>.

1 For the meaning of 'owner' see PARA 775 note 3 ante.

2 For the meaning of 'land' see PARA 761 note 1 ante.

3 For the meaning of 'rentcharge' see PARA 774 note 1 ante.

4 The one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. The Secretary of State exercising functions under the Rentcharges Act 1977 is in practice the Secretary of State for the Environment, Transport and the Regions or, in the case of land in Wales, the Secretary of State for Wales. Any expenses incurred by the Secretary of State in consequence of the Rentcharges Act 1977 are to be paid out of money provided by Parliament: s 15(1).

5 As to apportionment orders see further *ibid* s 5; and PARA 846 post; as to the effect of an apportionment order see s 7; and PARA 847 post; and as to expenses see s 15(2), (3); and PARA 845 notes 4-5 post.

6 *Ibid* s 4(1). Such an application must specify the amount (if any) equitably apportioned to the applicant's land: s 4(4)(a). As to the apportionment of rentcharges in equity see PARA 849 post; and EQUITY vol 16(2) (2003 Reissue) PARA 456. The statutory provisions relating to the apportionment of rentcharges apply equally to the further apportionment of legally apportioned parts of rentcharges: s 13(2). 'Legal apportionment' and 'equitable apportionment' in relation to a rentcharge mean, respectively (1) any apportionment of the rentcharge which is binding on the rent owner; and (2) any apportionment or exoneration of the rentcharge which is not binding on the rent owner: s 13(1). 'Apportionment' includes an apportionment which provides for the amount apportioned to any part of the land affected by the rentcharge to be nil: s 13(1). For the meaning of 'rent owner' see PARA 775 note 4 ante.

7 See *ibid* s 4(2). Such an application must specify the applicant's proposal for apportioning the rentcharge between the parts of his land specified in the application: s 4(4)(b). An application under this provision permits apportionment of a rentcharge in anticipation of subdivision of the land affected by it. If this is done, collection problems will not subsequently arise as between the owners of the several parts of the land. An application may propose that as to part of the land no sum should be apportioned to it: see the meaning of 'apportionment' in note 6 *supra*.

The provisions for apportionment, and the provisions for redemption (see PARAS 900-902 post), comprised in the Rentcharges Act 1977 are in place of the former procedures contained in the Law of Property Act 1925 s 191 (repealed) and the Inclosure Act 1854 ss 3, 10-14 (as amended), as extended by the Landlord and Tenant Act 1927 s 20 (amended by the Rentcharges Act 1977 s 17(1), (4), Sch 1 para 3; and the Housing Act 1980 s 143(1), (3)). Those provisions of the Inclosure Act 1854 apply to rents under leases as well as rentcharges (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 281) and are not repealed by the Rentcharges Act 1977, but no application for apportionment may be made under the Inclosure Act 1854 s 10 (as amended) in a case in which such an application may be entertained under the Rentcharges Act 1977: see the Inclosure Act 1854 s 10 (amended by the Rentcharges Act 1977 s 17(1), Sch 1 para 1).

8 Rentcharges Act 1977 s 4(3)(a), referring to rentcharges of a kind mentioned in s 2(3)(d) (see PARA 774 ante) and s 3(3)(a) (see PARA 894 post).

9 *Ibid* s 4(3)(b). In general, the apportionment procedure under the Rentcharges Act 1977 would serve no useful purpose in respect of these rentcharges.

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#### **845. Form of application.**



An application<sup>1</sup> for apportionment of a rentcharge must be in such form, contain such information and be accompanied by such documents as may be prescribed by regulations<sup>2</sup>. Where the Secretary of State considers that any additional document or information ought to be furnished, he may require the applicant to deliver to him such documents, including documents of title<sup>3</sup>, and furnish such information, as he may specify<sup>4</sup>. Where an applicant's documents of title are in the custody of a mortgagee, the mortgagee must, if requested to do so by the Secretary of State for the purpose of the application, deliver those documents to him on such terms as to their custody and return as the mortgagee may reasonably require<sup>5</sup>.

1 Ibid under the Rentcharges Act 1977 s 4: see PARA 844 ante.

2 Ibid s 4(5). See the Rentcharges Regulations 1978, SI 1978/16, reg 3, Schedule, Forms 1, 2.

Regulations under any provision of the Rentcharges Act 1977 are to be made by the Secretary of State and contained in a statutory instrument, which is to be subject to annulment in pursuance of a resolution of either House of Parliament: s 12(1). Such regulations may contain such incidental and supplemental provisions as the Secretary of State considers appropriate, and may make different provision in relation to different cases or classes of case and in relation to different circumstances: s 12(2). As to the Secretary of State see PARA 844 note 4 ante.

3 Ibid s 4(6)(a) reads 'including documents of title and, in the case of registered land, an authority to inspect the register' and these words do not appear to have been repealed or amended, despite the substitution of the Land Registration Act 1925 ss 112-112C by the Land Registration Act 1988 s 1. Under the Land Registration Act 1925 s 112 (as so substituted), however, any person may, subject to such conditions as may be prescribed and on payment of any fee payable, inspect and make copies of and extracts from (1) entries on the register; and (2) documents referred to in the register which are in the custody of the registrar, other than leases or charges or copies of leases and charges: see s 112(1) (as so substituted); and LAND REGISTRATION. An authority to inspect the register would not now appear to be required.

The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION. See also PARA 772 note 4 ante.

4 Rentcharges Act 1977 s 4(6). The applicant is responsible for the reasonable expenses of any person who delivers such a document or furnishes such information on his behalf: Rentcharges Regulations 1978, SI 1978/16, reg 6(1). Subject to any provision made by regulations, the applicant is generally responsible for any expenses incurred by any person in connection with his application: Rentcharges Act 1977 s 15(2).

5 Ibid s 4(7). The applicant is responsible for the mortgagee's reasonable expenses: see s 15(3); and the Rentcharges Regulations 1978, SI 1978/16, reg 6(2).

## UPDATE

### 845 Form of application

NOTE 3--Land Registration Act 1925 replaced by Land Registration Act 2002: see LAND REGISTRATION.

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### 846. Apportionment order; appeal.

Where an application for apportionment of a rentcharge is made<sup>1</sup>, and the Secretary of State is satisfied that he is in a position to do so, he must prepare a draft order for apportionment of the rentcharge<sup>2</sup>. If the application is made for an order apportioning the rentcharge between land owned by the applicant and other land affected by it<sup>3</sup>, the amount specified in the draft order as being that part of the rentcharge apportioned to the applicant's land must be the amount specified in the application as the amount equitably apportioned<sup>4</sup> to that land, or, where no amount has been equitably apportioned to that land, such amount as the Secretary of State considers appropriate<sup>5</sup>. If the application is made for an order apportioning the rentcharge between specified parts of the applicant's land<sup>6</sup>, the amounts specified in the draft order as apportioned between the parts of the applicant's land specified in the application must be those proposed in the application<sup>7</sup>. A copy of the draft order must be served by the Secretary of State on the person appearing to him to be the rent owner<sup>8</sup> or his agent, and, where no amount has been equitably apportioned to the applicant's land, on such persons as appear to him to be the owners<sup>9</sup> of the land affected by the rentcharge<sup>10</sup>.

Within the period of 21 days of the service of the draft order on him or his agent (or such longer period, not exceeding the period of 42 days, as the Secretary of State in a particular case may allow), the rent owner may object to it on the ground that such an apportionment would provide insufficient security for any part of the rentcharge<sup>11</sup>, and may make a written application to the effect that in the event of the apportionment not exceeding the sum of £5<sup>12</sup> a condition should be imposed that the order should have effect only for the purpose of the redemption of that part of the rentcharge<sup>13</sup>. In addition, within the same period (or extended period), the owner of any land affected by the rentcharge on whom a draft order has been served may make written representations to the Secretary of State concerning the apportionment specified in the draft order<sup>14</sup>.

The Secretary of State must consider any objection or representations duly made and, if he is satisfied that the draft order should be modified (1) in the case of an objection, in order to preserve for the rent owner sufficient security for each apportioned part of the rentcharge; or (2) to take account of any such representations, he must make such modifications in the draft order as appear to him to be appropriate<sup>15</sup>. If no objection or representation has been made in the prescribed period, or the objection and all representations have been considered by the Secretary of State, he must, if the application has not been withdrawn and he is satisfied that it is appropriate to do so, make an apportionment order<sup>16</sup>.

Where the applicant or the rent owner, or, where no amount has been equitably apportioned to the applicant's land, any other person who is the owner of any land affected by the rentcharge, is aggrieved by the terms of an apportionment order, he may appeal to the Lands Tribunal<sup>17</sup>. Where an appeal has been duly made to the Lands Tribunal it must either confirm the order, or set it aside and make such other order apportioning the rentcharge as it thinks fit<sup>18</sup>.

1    Ie under the Rentcharges Act 1977 s 4: see PARAS 844-845 ante.

2    Ibid s 5(1). As to the Secretary of State see PARA 844 note 4 ante.

3    Ie if the application is made under ibid s 4(1): see PARA 844 ante.

4    For the meaning of 'equitable apportionment' see PARA 844 note 6 ante. As to the apportionment of rentcharges in equity see PARA 849 post; and EQUITY vol 16(2) (Reissue) PARA 456.

5    Rentcharges Act 1977 s 5(2).

6    Ie if the application is made under ibid s 4(2): see PARA 844 ante.

7    Ibid s 5(3).

8    For the meaning of 'rent owner' see PARA 775 note 4 ante.

9    For the meaning of 'owner' see PARA 775 note 3 ante.

10 Rentcharges Act 1977 s 5(4). As to the service of documents see PARA 848 post.

11 Ibid s 5(5)(a). Any objection under s 5(5) must be made in writing (s 5(7)), and must state what apportionment, if any, would in the rent owner's opinion provide sufficient security for the rentcharge or, as the case may be, part of the rentcharge (s 5(8)).

12 Ie the sum mentioned in ibid s 7(2): see PARA 847 post.

13 See ibid ss 5(5)(b), (7), 7(2). As to the redemption of rentcharges see PARAS 900-902 post.

14 See ibid s 5(6), (7).

15 Ibid s 5(9). Where modifications have been made the applicant must be given an opportunity to withdraw his application before the order is made: see s 5(12).

16 Ibid s 5(10). The order must be in the form of the draft but incorporating any modifications made under s 5(9) and, where appropriate, a condition imposed by virtue of s 7(2): s 5(10). Copies of the order must be served on the applicant and on the person appearing to be the rent owner or his agent, and, in a case falling within s 5(2)(b), on those other persons on whom copies of the draft order were served: s 5(11). As to service of documents see PARA 848 post.

17 Ibid s 6(1). As to the establishment of, and procedure before, the Lands Tribunal see generally COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 720 et seq; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 165 et seq.

18 Ibid s 6(2). The tribunal's power to make another order is subject to s 7(2) (see PARA 847 post): s 6(2).

## UPDATE

### 846 Apportionment order; appeal

TEXT AND NOTES 17, 18--References to the Lands Tribunal are now to the Upper Tribunal: Rentcharges Act 1977 s 6(1), (2) (amended by SI 2009/1307).

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### 847. Effect of apportionment order.

An apportionment order<sup>1</sup> takes effect on the expiry of 28 days beginning with the day on which it is made<sup>2</sup>, or, if an appeal<sup>3</sup> has been duly made against it, on a day specified by the Lands Tribunal<sup>4</sup>. If:

- 3 (1) in the case of an application apportioning the rentcharge<sup>5</sup> between the applicant's land<sup>6</sup> and other land affected by it<sup>7</sup>, the part of the rentcharge apportioned to the applicant's land does not exceed the annual sum of £5<sup>8</sup>; or
- 4 (2) in the case of an application for an order apportioning the rentcharge between specified parts of the applicant's land<sup>9</sup>, any apportioned part of the rentcharge does not exceed such annual sum,

then where an application<sup>10</sup> that a condition be imposed has been duly made, it must be made a condition of the apportionment order that it will have effect only for the purpose of the redemption<sup>11</sup> of that part of the rentcharge<sup>12</sup>. The Secretary of State may not impose such a condition in any case where he considers that, having regard to all the circumstances, to do so would cause the applicant to suffer financial hardship<sup>13</sup>.

Where an application has been made for an order apportioning the rentcharge between the applicant's land and other land affected by it, the effect of an apportionment order is to release the applicant's land from any part of the rentcharge not apportioned to it and to release the remaining land affected by the rentcharge from such part, if any, of the rentcharge as is apportioned to the applicant's land<sup>14</sup>. Where an application has been made for an order apportioning the rentcharge between specified parts of the applicant's land, the effect of an apportionment order is to release each part of the applicant's land from any part of the rentcharge not apportioned to it<sup>15</sup>.

1 'Apportionment order' means an order made under the Rentcharges Act 1977 s 5(10), or, where appropriate, an order made by the Lands Tribunal under s 6(2)(b) (see PARA 846 ante): s 13(1).

2 Ibid s 7(1)(a).

3 As to appeals against apportionment orders to the Lands Tribunal see PARA 846 ante.

4 Rentcharges Act 1977 s 7(1)(b).

5 For the meaning of 'rentcharge' see PARA 774 note 1 ante.

6 For the meaning of 'land' see PARA 761 note 1 ante.

7 Ie under the Rentcharges Act 1977 s 4(1): see PARA 844 ante.

8 The Secretary of State may by regulations specify, in substitution for the sum of £5, such other annual sum as he considers appropriate: ibid s 7(6). At the date at which this volume states the law, no such regulations had been made. As to the making of regulations generally see PARA 845 note 2 ante. As to the Secretary of State see PARA 844 note 4 ante.

9 Ie under ibid s 4(2): see PARA 844 ante.

10 Ie under ibid s 5(5)(b): see PARA 846 ante.

11 As to the redemption of rentcharges see generally paras 900-902 post.

12 Rentcharges Act 1977 s 7(2).

13 Ibid s 7(3). As to the Secretary of State see PARA 844 note 4 ante.

14 Ibid s 7(4).

15 Ibid s 7(5). 'Apportionment' and 'equitable apportionment' may, in relation to any particular part of the land, include a nil amount or equitable exoneration: see PARA 844 note 6 ante. A legal apportionment under the statutory procedure may accordingly have the effect of wholly releasing part of the land affected by the rentcharge, the burden of the entire rentcharge falling on the remainder of the land.

## UPDATE

### 847 Effect of apportionment order

TEXT AND NOTES 1, 4--References to the Lands Tribunal are now to the Upper Tribunal: Rentcharges Act 1977 ss 7(1)(b), 13(1) (amended by SI 2009/1307).

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### 848. Service of documents.

Any document required to be served under the Rentcharges Act 1977 may be served on the person to be served either by delivering it to him, or by leaving it at his proper address<sup>1</sup> or by sending it by post<sup>2</sup>. Any document required to be served on a body corporate or a firm is duly served if it is served on the secretary or clerk of that body or a partner of that firm<sup>3</sup>.

1 For the purposes of the Rentcharges Act 1977 s 16, and of the Interpretation Act 1978 s 7 (service by post: see STATUTES vol 44(1) (Reissue) PARA 1388), in its application to the Rentcharges Act 1977 s 16, the proper address of a person is (1) in the case of a secretary or clerk of a body corporate, that of the registered or principal office of that body (s 16(3)(a)); (2) in the case of a partner of a firm, that of the principal office of the firm (s 16(3)(b)); (3) in any other case, the last known address of the person to be served (s 16(3)(c)).

2 Ibid s 16(1).

3 Ibid s 16(2).

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### **C. EQUITABLE APPORTIONMENT**

#### **849. Effect of equitable apportionment apart from statute.**

Unless made under the relevant statutory provisions<sup>1</sup>, an apportionment or an exoneration of part of the land from a rentcharge without the concurrence of the owner of the rentcharge only takes effect in equity and does not affect the rights and remedies of the owner of the rentcharge<sup>2</sup>. Apart from statute the rights of any person who is compelled to pay more than his proportion of the rentcharge are regulated by the covenants binding upon the owners of the portions of the land<sup>3</sup>. In addition there is at common law a right of contribution<sup>4</sup>. Thus, if a person grants a rentcharge issuing out of two properties and afterwards sells the properties to different persons, and the owner of the rentcharge resorts to one property only, the purchaser of that property may have contribution from the purchaser of the other<sup>5</sup>. Similarly, if on a death one property passed to a devisee under the will of the deceased, and the other to the heir, the devisee and the heir had to contribute rateably to the payment of the rentcharge<sup>6</sup>.

1 I.e. the Rentcharges Act 1977 (see PARAS 844-848 ante) or the provisions which that Act replaced (see PARA 844 note 7 ante).

2 As to the apportionment of rentcharges in equity see EQUITY vol 16(2) (Reissue) PARA 456.

3 As to conveyance of land subject to a rentcharge see generally SALE OF LAND.

4 As to contribution generally see CONTRACT.

5 *Anon* (undated) Cary 3; and see *Knight v Calthorpe* (1685) 1 Vern 347; *Averall v Wade* (1835) L & G temp Sugd 252 at 265n; *Booth v Smith* (1884) 14 QBD 318 at 322-323, CA; *Christie v Barker* (1884) 53 LJQB 537 at 542, CA; *Pertwee v Townsend* [1896] 2 QB 129 at 133; *Cundiff v Fitzsimmons* [1911] 1 KB 513. Cf *Johnson v Wild* (1890) 44 ChD 146 at 150. The nature of the indemnity which the other purchasers could require where land subject to one rentcharge was sold in lots, the purchaser of one lot to pay the rent, was considered in *Casamajor v Strobe* (1819) 2 Swan 347.

6 *Eyre v Green* (1846) 2 Coll 527 at 534.

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### **850. Statutory remedies on equitable apportionment.**

Where, in a conveyance made after 1925 for valuable consideration, other than a mortgage, of part of land which is affected by a rentcharge, the rentcharge or a part of it is, without the owner's consent, expressed to be (1) charged exclusively on the land conveyed or any part of it in exoneration of the land retained or other land<sup>1</sup>; or (2) charged exclusively on the land retained or any part of it in exoneration of the land conveyed or other land<sup>2</sup>; or (3) apportioned between the land conveyed and that retained, or any parts of it<sup>3</sup>, the charge or apportionment is, without prejudice to the rights of the owner of the rentcharge, binding as between the grantor and the grantee under the conveyance and their respective successors in title<sup>4</sup>.

If any default is made in payment of the whole or part of a rentcharge by the person who, by reason of such a charge or apportionment, is liable to pay the same<sup>5</sup>, or if any breach occurs of any of the covenants<sup>6</sup> or conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land retained or conveyed<sup>7</sup>, then certain statutory remedies are conferred on the owner for the time being of any other land affected by the entire rentcharge who pays or is required to pay the whole or part of the rentcharge which ought to have been paid by the defaulter<sup>8</sup> or who incurs any costs, damages or expenses by reason of the breach of covenant or condition<sup>9</sup>. Such an owner may enter and distrain on the land in respect of which the default or breach is made or occurs, or on any part of that land, and dispose according to law of any distress found<sup>10</sup>. He may also take possession of the income of the same land until, by means of such distress and receipt of income or otherwise, the whole or part of the rentcharge so unpaid and all costs, damages and expenses incurred by reason of the non-payment of it or of the breach of the covenants or conditions are fully paid or satisfied<sup>11</sup>.

1 Law of Property Act 1925 s 190(1)(a), (7). For the meaning of 'conveyance' see REAL PROPERTY vol 39(2) (Reissue) PARA 232 note 1.

2 Ibid s 190(1)(b).

3 See ibid s 190(1)(c).

4 Ibid s 190(1).

5 Ibid s 190(2)(a).

6 I.e covenants other than, in the case of apportionment, the covenant to pay the entire rentcharge: ibid s 190(2)(b).

7 Ibid s 190(2)(b).

8 Ibid s 190(2)(i).

9 Ibid s 190(2)(ii).

10 Ibid s 190(2). As to distress for rent see generally DISTRESS vol 13 (2007 Reissue) PARA 905 et seq.

11 Ibid s 190(2).

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## 851. Application of statutory remedies.

The statutory remedies<sup>1</sup> take effect so far only as they might have been conferred by the conveyance by which the rent or any part of it is expressed to be charged or apportioned<sup>2</sup>, and apply only if and so far as a contrary intention is not expressed in that conveyance<sup>3</sup>. They take effect subject to the terms of the conveyance and to the provisions contained in it<sup>4</sup>. They do not apply where the rentcharge has been charged exclusively or legally apportioned with the owner's consent<sup>5</sup>. The rule of law relating to perpetuities does not affect these statutory powers or remedies or any like powers or remedies expressly conferred by an instrument<sup>6</sup>.

1 As to the statutory remedies see PARA 850 ante.

2 Law of Property Act 1925 s 190(5). A trustee, personal representative, mortgagee or other person in a fiduciary position has, and is deemed always to have had, power to confer the same or like remedies: s 190(5).

3 See *ibid* s 190(6). For the meaning of 'conveyance' see REAL PROPERTY vol 39(2) (Reissue) PARA 232 note 1.

4 *Ibid* s 190(6).

5 *Ibid* s 190(7). As to legal apportionment see PARA 842 ante.

6 *Ibid* s 190(8). The reconsideration of s 190(8), together with certain other enactments relating to rights of entry and perpetuity, has been suggested: see the *Fourth Report of the Law Reform Committee* (1956) (Cmd 18) PARA 43; and see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1006, 1043.

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## (3) INTEREST ON ARREARS

### 852. Annuities given by will.

Annuities given by will which are deferred by the necessities of the case do not carry interest<sup>1</sup>. By way of exception, interest may be given where there is misconduct or improper delay on the part of those chargeable with the payment of the annuity<sup>2</sup>.

1 *Re Earl of Berkeley, Inglis v Countess of Berkeley* [1968] Ch 744 at 760, [1968] 3 All ER 364 at 373, CA. See also *Taylor v Taylor* (1849) 8 Hare 120; *Torre v Browne* (1855) 5 HL Cas 555; *Booth v Coulton* (1861) 2 Giff 514; *Wheatley v Davies* (1876) 24 WR 818; *Edwards v Warden* (1876) 1 App Cas 281 at 305, HL; *Re Hiscoe, Hiscoe v Waite* [1902] WN 49. In the older cases the power to grant interest was stated to be discretionary (*Morris v Dillingham* (1750) 2 Ves Sen 170); and as an exception interest was sometimes granted in favour of the annuitant where the annuity was a provision for a wife or child (*Litton v Litton* (1719) 1 P Wms 541). This exception has, however, been disapproved: *Torre v Browne* *supra* at 578. Cf the rule that interest will not be allowed on the arrears of a jointure, unless a special case is made: *Anon* (1755) 2 Ves Sen 662; *Morgan v Morgan* (1784) 2 Dick 643; *Knight v Maclean* (1792) 3 Bro CC 496; *Tew v Earl Winterton* (1792) 1 Ves 451; *Mellish v Mellish* (1808) 14 Ves 516.

2 *Torre v Browne* (1855) 5 HL Cas 555 at 578-579; *Blogg v Johnson* (1867) 2 Ch App 225 at 228-229; and see *Stapleton v Conway* (1750) 1 Ves Sen 427; *Willcocks v Butcher* (1848) 16 Sim 366.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(3) INTEREST ON ARREARS/853. Annuities granted by deed.

### 853. Annuities granted by deed.

An annuity deed may contain a clause which expressly makes interest payable on arrears of the annuity<sup>1</sup>. In the absence of such a clause, the statutory remedies conferred on annuitants and owners of rentcharges<sup>2</sup> do not apparently enable them to recover interest on arrears<sup>3</sup>; but the court has a general statutory power to award interest on any debt for the period between the date when the cause of action arose and the date of judgment<sup>4</sup>. Where, after the debtor's death, an annuity secured by covenant falls into arrear, and, on the annuitant claiming the arrears against the debtor's general assets, judgment is given for administration, interest<sup>5</sup> is allowed as to the arrears due at the judgment from the date of the judgment and as to the instalments accruing after judgment from the dates when they accrue due<sup>6</sup>.

1 See eg *Tynte v Hodge*, *Tynte v Beavan* (1864) 2 Hem & M 287.

2 See the Law of Property Act 1925 s 121 (as amended); and PARA 863 et seq post.

3 Cf *Booth v Leycester* (1838) 3 My & Cr 459 at 465-466.

4 See the Supreme Court Act 1981 s 35A (as added); the County Courts Act 1984 s 69 (as amended); the Law Reform (Miscellaneous Provisions) Act 1934 s 3(1) (replaced by the Administration of Justice Act 1982 s 15, Sch 1 in relation to awards by the High Court and the county courts); and COURTS; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307. As to the power to recover a rentcharge by an action of debt see PARA 877 post.

5 The current rate of interest is 8%; see the Judgments Act 1838 s 17 (amended, by virtue of the Administration of Justice Act 1970 s 44, by the Judgment Debts (Rate of Interest) Order 1993, SI 1993/564). See also the Administration of Justice Act 1970 s 44A (added, subject to a saving, by the Private International Law (Miscellaneous Provisions) Act 1995 s 1).

6 *Re Salvin*, *Worseley v Marshall* [1912] 1 Ch 332. Cf MORTGAGE vol 77 (2010) PARA 101 et seq. The rule stated in the text is the result of RSC Ord 44 r 9; and see EXECUTORS AND ADMINISTRATORS; *Lainson v Lainson (No 2)* (1853) 18 Beav 7, where interest was allowed under the then existing rules of court. In previous decisions given when no such rules were in force, interest in such a case was refused: *Booth v Leycester* (1838) 3 My & Cr 459; and see *Earl of Mansfield v Ogle* (1859) 4 De G & J 38 at 40. It was said that the discretion previously exercised by the Court of Chancery as to allowing or not allowing interest was not altered by the discretion given by the Civil Procedure Act 1833 s 28 (repealed; now replaced by the enactments cited in note 4 supra); see *Re Powell's Trust* (1852) 10 Hare 134; and see *Earl of Mansfield v Ogle* supra at 42. In the case of annuities secured by bonds, interest was allowed, but not exceeding the penalty: *Newman v Auling* (1747) 3 Atk 579; *Mackworth v Thomas* (1800) 5 Ves 329; *Crosse v Bedingfield* (1841) 12 Sim 35. In the case of annuities secured by judgments, interest on the judgments was formerly refused (*Bedford v Coke* (1743) 1 Dick 178; *Booth v Leycester* supra); but since the Judgments Act 1838 s 17 (as amended), such a judgment carries interest (*Knight v Bowyer* (1859) 4 De G & J 619). See also *Hyde v Price* (1837) 8 Sim 578; and CIVIL PROCEDURE.

## UPDATE

### 853 Annuities granted by deed

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 6--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(3) INTEREST ON ARREARS/854. Claim against land charged with general incumbrances.



## 854. Claim against land charged with general incumbrances.

Where an annuity which constitutes one of several incumbrances on land falls into arrear, and an action is commenced for redemption or foreclosure, then, as between incumbrances and as against the land charged, no interest on the arrears is as a general rule allowed<sup>1</sup>. The allowance of interest on arrears in such a case may be justified by a special covenant on the part of the grantor of an annuity to indemnify the annuitant against other incumbrances<sup>2</sup>.

1 *Earl of Mansfield v Ogle* (1859) 4 De G & J 38; explained in *Re Salvin, Worseley v Marshall* [1912] 1 Ch 332; and see *Robinson v Cumming* (1742) 2 Atk 409 at 411, where it was said that if an annuitant entered, the court would not have ordered him to quit, unless he were paid interest on arrears; *Re Ussher's Estate* [1918] 1 IR 259; *Greig v Merchant Co of Edinburgh* 1921 SC 76, where no interest was allowed on arrears of an annuity until after decree. As to interest on the arrears of a jointure see the cases cited in PARA 853 note 6 ante.

2 *Martyn v Blake* (1842) 3 Dr & War 125 at 140.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/855. Deductions of tax.

## (4) INCOME TAX AND INHERITANCE TAX

### 855. Deductions of tax.

Payments in respect of rentcharges and annuities are subject to income tax<sup>1</sup>. The amount of income tax in the case of annuities is deductible at source<sup>2</sup>. However, in the case of rentcharges, the tax is only deductible at source in respect of the tax which is or may become chargeable on the income of a person whose usual place of abode is outside the United Kingdom<sup>3</sup>. Where any annuity or other annual payment charged with tax under Case III of Schedule D is payable wholly out of profits or gains brought into charge to tax, the person liable to make the payment is entitled on making the payment to deduct and retain out of it a sum representing the amount of income tax on it<sup>4</sup>. Where any such annuity or other annual payment is not wholly payable out of profits or gains brought into charge to tax, the person by or through whom any such payment is made must, on making the payment, deduct out of it a sum representing the amount of income tax on it and account for it to the Commissioners of Inland Revenue<sup>5</sup>.

1 Payments in respect of rentcharges are charged to income tax under the Income and Corporation Taxes Act 1988 s 15(1), Schedule A para 1(3)(b) (substituted by the Finance Act 1995 s 39(1), (3), (4), Sch 6 para 1), and payments in respect of annuities are similarly charged under the Income and Corporation Taxes Act 1988 s 18(1), Schedule D Case III (as amended): see INCOME TAXATION vol 23(1) (Reissue) PARAS 45, 472. Where the purchase price of land or other property is payable by instalments containing an interest element, the annual payments, except in so far as they consist of interest, are not taxable as an annuity: see *Vestey v IRC* [1962] Ch 861, [1961] 3 All ER 978, where extrinsic documentary evidence clearly showed that what was called the purchase price 'without interest' contained an interest element; see also INCOME TAXATION vol 23(1) (Reissue) PARA 477.

2 See the Income and Corporation Taxes Act 1988 ss 348, 349(1) (as amended); and INCOME TAXATION vol 23(1) (Reissue) PARA 532 et seq.

3 See *ibid* s 42A (added by the Finance Act 1995 s 40(1)); and INCOME TAXATION vol 23(1) (Reissue) PARA 53.

4 See the Income and Corporation Taxes Act 1988 s 348(1)(b); and INCOME TAXATION vol 23(1) (Reissue) PARA 528.

5 See *ibid* ss 349(1), 350(1) (as amended); and INCOME TAXATION vol 23(1) (Reissue) PARA 532.

## UPDATE

### 855 Deductions of tax

NOTE 1--Income and Corporation Taxes Act 1988 s 15(1), Schedule A para 1(3)(b), s 18(1), Schedule D Case III replaced by provisions of the Corporation Tax Act 2009. For destination of replaced provisions see table, INCOME TAXATION vol 23(2) (Reissue) PARA 1900E.

NOTES 2-5--Income and Corporation Taxes Act 1988 ss 42A, 348-350 replaced by provisions of the Income Tax Act 2007. For destination of replaced provisions see table, INCOME TAXATION vol 23(2) (Reissue) PARA 1900D.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/856. Avoidance of agreements for payment without deduction of tax.

### 856. Avoidance of agreements for payment without deduction of tax.

Every agreement for payment of interest, rent or other annual payment in full without allowing a deduction of tax authorised by the Tax Acts is void<sup>1</sup>. Only so much of the agreement, however, as disallows the deduction of tax is avoided<sup>2</sup>. The provision for avoidance does not apply to wills<sup>3</sup> or to orders of court, although it does apply to an agreement made in compliance with such an order<sup>4</sup>.

Moreover, an agreement to pay an annuity of such a sum as, after deduction of income tax at the basic rate, will be equal to a stated amount is permissible<sup>5</sup>. It is treated for income tax purposes as an agreement to pay the grossed sum from which the payer is entitled or bound to deduct tax on making the payment, which sum, as so grossed, becomes part of the payee's total income for higher rate income tax and other purposes<sup>6</sup>. This method of providing for what is in effect a tax-free annuity is now usual; indeed, rectification has been obtained to bring a covenant within the principle<sup>7</sup>.

1 See the Taxes Management Act 1970 s 106(2); and INCOME TAXATION vol 23(1) (Reissue) PARA 505. For the meaning of 'the Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21.

2 *Howe v Synge* (1812) 15 East 440; *Re Gretton's Indenture, Re Ratcliff and Brinckman's Trusts, Hood v Lady Byron* [1923] 1 Ch 77, where an annuity was bequeathed free of income tax and a smaller annuity substituted by deed.

3 *Festing v Taylor* (1862) 3 B & S 235; *Lord Lovat v Duchess of Leeds* (1862) 2 Drew & Sm 62; *Re Bannerman's Estate, Bannerman v Young* (1882) 21 ChD 105.

4 See INCOME TAXATION vol 23(1) (Reissue) PARA 505. As to payments under orders of court see also DIVORCE; INCOME TAXATION vol 23(1) (Reissue) PARAS 473 et seq, 547.

5 See eg *Re MacLennan, Few v Byrne* [1939] Ch 750, [1939] 3 All ER 81, CA; and see INCOME TAXATION vol 23(1) (Reissue) PARA 527.

6 *Countess of Shrewsbury v IRC* [1936] 2 KB 582, [1936] 2 All ER 101; and see INCOME TAXATION vol 23 (Reissue) PARA 527.

7 *Burroughes v Abbott* [1922] 1 Ch 86; and see *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch 67, [1936] 3 All ER 193; *Whiteside v Whiteside* [1950] Ch 65, [1949] 2 All ER 913, CA.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/857. Effect of particular expressions as indicating that bequest is free of tax.

### **857. Effect of particular expressions as indicating that bequest is free of tax.**

If a testator directs the payment of an annuity out of the income of his estate, the annuity is not payable free of income tax unless there is direction to that effect in the will<sup>1</sup>. If there is no such direction, the annuitant must bear the income tax on the annuity<sup>2</sup>. Although provision is made by tax legislation for the deduction of income tax on the payment of annuities<sup>3</sup>, income tax in respect of an annuity is strictly a charge upon the recipient personally and not a deduction from the annuity within the meaning of the term 'deduction' as used in a will; hence the mere fact that an annuity is bequeathed free of all deductions is not a direction sufficient to show that it is payable free of income tax, and, if there is no other context showing that the bequest was free of tax<sup>4</sup>, the annuitant must bear the tax<sup>5</sup>. It is not a sufficient direction to bequeath an annuity free of all duties<sup>6</sup> or a clear annuity<sup>7</sup>, nor is a direction to set aside a sum sufficient to produce a specified weekly net income and to pay the sum to the annuitant sufficient<sup>8</sup>. It makes no difference if, in fact, the annuity is paid out of income from which income tax has been deducted at the source<sup>9</sup>. A reference to freedom from taxes or freedom from deduction for taxes will generally be enough to show that the annuity is to be free of income tax<sup>10</sup>. Where a testator bequeathed to his former wife, who had divorced him, an annuity to be considered as a continuation of the alimony which he was paying her, and he in fact continued to pay the alimony without deduction of tax, the annuity was held to be payable free of income tax<sup>11</sup>.

If through a genuine mistake the trustees of a will overpay a person entitled to an annuity under the will either by treating the annuity as given free of tax when it is not so given or by an error in computing the amount payable where the annuity is given free of tax, the court in the administration of the estate will normally allow the parties' rights to be adjusted by the making of appropriate deductions from future payments<sup>12</sup>. Where, however, an annuity has by mistake been paid without deduction of tax, and the relationship between the payer and payee is merely that of debtor and creditor and not that of trustee and beneficiary, the mistake is one of law and overpayment may not be deducted from future payments<sup>13</sup>.

1 *Re Skinner, Milbourne v Skinner* [1942] Ch 82 at 83, [1942] 1 All ER 32 at 33.

2 *Re Sharp, Rickett v Rickett* [1906] 1 Ch 793; *Wilson's Trustees v Wilson* 1919 SC 359.

3 See PARA 855 ante.

4 Cf para 886 text and note 7 post.

5 *Lethbridge v Thurlow* (1851) 15 Beav 334; *Sadler v Rickards* (1858) 4 K & J 302; *Abadam v Abadam* (1864) 33 Beav 475; *Kinloch's Trustees v Kinloch* (1880) 7 R 596, Ct of Sess; *Gleadow v Leetham* (1882) 22 ChD 269; *Re Musgrave, Machell v Parry* [1916] 2 Ch 417; *Re Wells' Will Trusts, Public Trustee v Wells* [1940] Ch 411, [1940] 2 All ER 68; *Re Best, Belk v Best* [1942] Ch 77, [1941] 3 All ER 315, where in a marriage settlement the words were 'such a sum as shall after all deductions amount to £300 per annum'; *Re Skinner, Milbourne v Skinner* [1942] Ch 82 at 83, [1942] 1 All ER 32 at 33; *Re Hooper, Phillips v Steel* [1944] Ch 171, [1944] 1 All ER 227. The cases of *Countess of Shrewsbury v Earl of Shrewsbury* (1906) 22 TLR 598, where in relation to an annuity payable under a separation agreement 'clear of all deductions' was held to refer to income tax, and *Re Cowlshaw, Cowlshaw v Cowlshaw* [1939] Ch 654, where 'free of all deductions whatever' was held to include income tax, appear to be inconsistent with the above authorities and would probably not be followed today.

6 *Re Saillard, Pratt v Gamble* [1917] 2 Ch 401, CA.

7 *Re Loveless, Farrer v Loveless* [1918] 2 Ch 1, CA; *Re Skinner, Milbourne v Skinner* [1942] Ch 82 at 83, [1942] 1 All ER 32 at 33; and see *Peareth v Marriott* (1882) 22 ChD 182, CA.

8 *Re Wright, Barclays Bank Ltd v Wright* [1952] 2 All ER 698.

9 *Re Cain's Settlement, Cain v Cain* [1919] 2 Ch 364; *Re Skinner, Milbourne v Skinner* [1942] Ch 82 at 83, [1942] 1 All ER 32 at 33. In Scotland it has been held that an annuity payable out of taxed income was itself payable free of tax (*Murdoch's Trustees v Murdoch* 1918 SC 738; *Smith's Trustees v Gaydon* 1919 SC 95), but later decisions are that such annuities fall to be paid after deduction of tax (*Hunter's Trustees v Mitchell* 1930 SC 978, followed and approved in *IRC v Watson* 1943 SC 115).

10 *Turner v Mullineux* (1861) 1 John & H 334; *Re Bannerman's Estate, Bannerman v Young* (1882) 21 ChD 105; *Re Buckle, Williams v Marson* [1894] 1 Ch 286, CA; *Re Shrewsbury Estate Acts, Shrewsbury v Shrewsbury* [1924] 1 Ch 315, CA, where there was an appointment of a jointure 'clear of all deductions whatsoever for taxes or otherwise' under a power conferred by a private Act; *Re Williams, Williams v Templeton* [1936] Ch 509, [1936] 1 All ER 175, CA. In these cases the annuity was held to be free of income tax. As to the power to appoint a jointure free of taxes see POWERS.

11 *Re Batley, Public Trustee v Hert* [1951] Ch 558, CA.

12 *Re Musgrave, Machell v Parry* [1916] 2 Ch 417; *Re Dunville, Brownrigg v Dunville* [1946] NI 90 at 108-109; varied in [1947] NI 50, NI CA; and see INCOME TAXATION vol 23(1) (Reissue) PARA 515; MISTAKE. If the income is insufficient to pay the annuity in full and payments are made on account, the tax should not be deducted from the payments on account but on settlement of the arrears with the annuitant or his personal representative: *Re Wooldridge, Wooldridge v Coe* [1920] WN 78. As to the right of a creditor, legatee or next of kin to recover assets from persons overpaid see EQUITY vol 16(2) (Reissue) PARA 865; EXECUTORS AND ADMINISTRATORS.

13 *Re Hatch, Hatch v Hatch* [1919] 1 Ch 351 (payments under separation deed); and see INCOME TAXATION vol 23(1) (Reissue) PARA 515. For the general rule that money paid voluntarily under a mistake of law cannot be recovered see MISTAKE vol 77 (2010) PARA 69 et seq. Tax may be deducted on payment of arrears: *Countess of Shrewsbury v Earl of Shrewsbury* (1906) 23 TLR 100; and see INCOME TAXATION vol 23(1) (Reissue) PARA 515.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/858. Circumstances in which annuity is free of higher rate tax.

### **858. Circumstances in which annuity is free of higher rate tax.**

A bequest of an annuity free of income tax *prima facie* means free of income tax including tax at the higher rate and (formerly) additional rates and surtax<sup>1</sup>. It is a gift to the annuitant of such a sum as will, after all questions as between the annuitant and the Crown in respect of income tax for that year have been settled, leave the annuitant with the sum mentioned<sup>2</sup>. Where there was a covenant in a settlement to pay in trust for the annuitant such sum as after deduction of income tax at the standard rate and of every other tax on income for the time being in force should leave a clear sum of a specified amount, the sum was held to be free of surtax<sup>3</sup>. Where a settlor covenanted to pay to the annuitant such an amount as, after deducting income tax and surtax and any other tax on income, should be necessary to make up her net income from the settled funds for any year to a specified amount, his estate was held liable to be debited with an amount of surtax attributable to the annuity for a year even though it was payable after the annuitant's death<sup>4</sup>.

Although the bequest of a sum by way of annuity 'free of income tax' means free of all income tax including tax at the higher rate, the effect is as if a direction has been made to pay such sum as after deduction of tax at the standard rate will leave the sum mentioned<sup>5</sup>, and the assessment in respect of higher rate tax will not be payable by deduction but by direct assessment on the recipient. Accordingly, if the wording of the bequest of an annuity free of income tax indicates that the freedom to be allowed is to be a freedom from deduction, the general rule that an annuity bequeathed free of tax is free of higher rate tax may not apply,

and the annuity may be held subject to that tax<sup>6</sup>. However, the effect of the bequest will depend in each case on its exact terms<sup>7</sup>.

1 Income tax at the higher rate and additional rates replaced the former surtax: see INCOME TAXATION vol 23(2) (Reissue) PARA 1289 et seq. It is assumed that the cases cited in the notes infra apply equally to tax at the higher rate as they applied to surtax.

2 *Re Reckitt, Reckitt v Reckitt* [1932] 2 Ch 144 at 153, CA ('annual sum of £5,000 free of income tax'); *Re Crosse, Oldham v Crosse* [1920] 1 Ch 240 ('the sum requisite to make up, together with the income tax payable to her under her marriage settlement, the clear annual sum of £4,000 a year'); *Re Doxat, Doxat v Doxat* [1920] WN 262 ('an annuity of £2,500 free of income tax and of all other deductions'); *Michelham's Trustees v IRC* (1930) 144 LT 163, CA ('free of income tax'); *Re Bowen, Paddock v Bowen* (1925) 70 Sol Jo 44 ('annuity to be paid without any deduction by equal quarterly payments free from income tax'); *Re Veale's Will and Codicils, Malone v James* (1931) 75 Sol Jo 780, CA (power to appoint jointure not to exceed £300 per annum 'free and clear of all taxes and incumbrances whatsoever'); *Smith's Trustees v Smith* 1924 SC 485 ('to be payable free of all income tax, government duties (if any) and all other deductions'); *Wordie's Trustees v Wordie* 1922 SC 28 (free of income tax).

3 *Re Horlick's Settlement Trusts, Colledge v Horlick* [1938] 4 All ER 602, CA.

4 *Re Sharman's Settlement, Public Trustee v Sharman* [1943] Ch 5, [1942] 2 All ER 553.

5 See INCOME TAXATION vol 23(1) (Reissue) PARA 527. As to the computation of tax-free annuities see PARA 860 post.

6 See *Re Crawshay, Crawshay v Crawshay* [1915] WN 412 ('clear of all deductions, including income tax'); *Re Bates, Selmes v Bates* [1925] Ch 157 ('such sum as, after deduction of the income tax for the time being payable in respect thereof, will leave a clear sum of £2,000'); *Prentice's Trustees v Prentice* 1935 SC 211 ('payable free of all deductions including income tax and government duty which shall be paid by my general estate').

7 See *Re Reckitt, Reckitt v Reckitt* [1932] Ch 144 at 149-151, CA; and for cases in which annuities have been held to be payable free of surtax see *Re Doxat, Doxat v Doxat* [1920] WN 262; *Re Bowen, Paddock v Bowen* (1925) 70 Sol Jo 44; *Smith's Trustees v Smith* 1924 SC 485, cited in note 2 supra.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/859. Income tax imposed by countries abroad.

### 859. Income tax imposed by countries abroad.

In a will made in the United Kingdom by a testator residing there, 'free of taxes' refers to taxes imposed by the law of the United Kingdom, in the absence of a contrary intention<sup>1</sup>. Accordingly a bequest free of all taxes (including income tax) has been held not to include income tax to which the annuitant was liable under the law of Kenya where she had gone to live after the testator's death<sup>2</sup>. Where annuities were bequeathed clear of all deductions whatsoever including income tax deductible at the source or payable in New Zealand so long as the annuitants lived there, the annuities were held to be payable free of a New Zealand social security contribution which was assessed, collected and recovered as if it were income tax<sup>3</sup>.

1 *Re Dunville, Brownrigg v Dunville* [1947] NI 50, NI CA.

2 *Re Frazer, Frazer v Hughes* [1941] Ch 326, [1941] 2 All ER 155, applying *Re Norbury, Norbury v Fahland* [1939] Ch 528, [1939] 2 All ER 625 (death duties (now abolished; replaced by inheritance tax)). Cf *Re Quirk, Public Trustee v Quirk* [1941] Ch 46; and EXECUTORS AND ADMINISTRATORS. As to relief from double taxation see INCOME TAXATION vol 23 (Reissue) PARA 1104 et seq.

3 *Re Hirst, Public Trustee v Hirst* [1941] 3 All ER 466. As to the currency in which an annuity charged upon an immovable is to be paid see eg *Lansdowne v Lansdowne* (1820) 2 Bli 60, HL; and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 403.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/860. Computation of tax-free annuity.

### **860. Computation of tax-free annuity.**

If an annuity is bequeathed free of income tax the testator is taken to have intended to give, in addition to the stated amount of the annuity, such sum as will enable his trustees in each year to discharge the income tax on the annuity and the additional sum and to pay the balance to the annuitant<sup>1</sup>. If an annuity is bequeathed free of income tax and higher rate tax, the gift is of such a sum as after deduction of the income tax on it will leave the amount of the annuity, together with an additional annuity of such sum as, after deduction of the income tax on it, will leave the amount of the higher rate tax with which the annuitant is chargeable as between the annuitant and the revenue authorities<sup>2</sup>.

1 *IRC v Cook* [1946] AC 1 at 10, [1945] 2 All ER 377 at 380-381, HL. As to the annuitant's duty to account for repayments of tax obtained by him see PARA 861 post.

2 See *Michelham's Trustees v IRC* (1930) 144 LT 163 at 168, CA.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/861. Annuitant's duty to account to trustees for reliefs.

### **861. Annuitant's duty to account to trustees for reliefs.**

Where an annuity is given tax free, the annuitant is entitled to recover from the Commissioners of Inland Revenue the amount of any personal or other reliefs to which he is entitled in respect of his annuity on the footing that he has paid by deduction income tax at the basic rate on the grossed up amount of his annuity, and the commissioners are not entitled to disallow his claim merely on the ground that he intends to hand the money so recovered to the trustees through whom his annuity is paid<sup>1</sup>. Whether or not an annuitant is bound to pay over to the trustees the money so recovered depends upon the terms of the document or documents under which the annuity is payable<sup>2</sup>. The general principle, however, is that the annuitant is bound to account to the trustees for the proportion of the sum recovered by way of relief, which represents tax on the annuity, unless there is an express provision or a necessary implication to the contrary<sup>3</sup>. The principle is well established in the case of gifts in the form of bequests of annuities free of income tax<sup>4</sup>, and it appears that it applies also to a grant of an annuity, whether by deed or will, in the form of a gift of such a sum as after deduction of income tax will leave a specified amount or similarly worded gifts<sup>5</sup>. The principle has been held to apply where the annuity was given clear of income tax, or made payable without deduction of tax, up to a stated rate in the pound; in such a case, if the actual rate of tax paid exceeded the stated rate, repayment from the revenue attributable to the annuity must be divided between the annuitant and the trustees through whom the annuity is paid in the proportion in which they respectively bore the tax<sup>6</sup>. Where, however, a testator directed that, if at any time the stated amount of the annuity should exceed one-third of the total income of his estate after payment of income tax, the

amount to be paid to the annuitant should be one-third of that income, the principle previously stated was held to be inapplicable to the gift of the one-third of the total income after payment of income tax, and the annuitant was held not liable to account in any year in which she received such a share<sup>7</sup>.

An annuitant who is bound to account to the trustees of a will for amounts recovered in respect of overpayments of income tax in relation to the annuity is a trustee of his statutory rights to recover the overpayments and is bound at the trustees' request to sign all proper forms and documents for the purpose<sup>8</sup>.

An annuitant liable to account who has paid over to the trustees the proportion of tax recovered attributable to the annuity is entitled to deduct the amount so paid over in computing his total income<sup>9</sup>.

1 *IRC v Cook* [1946] AC 1, [1945] 2 All ER 377, HL. As to personal and other reliefs see INCOME TAXATION vol 23(1) (Reissue) PARA 844 et seq.

2 *Re Maclennan, Few v Byrne* [1939] Ch 750 at 752, [1939] 3 All ER 81 at 84, CA; *Rowan's Trustees v Rowan* 1940 SC 30 at 41. The question which has to be answered is in substance whether the reference to income tax was intended to achieve for the annuitant an indemnity against such part of his income tax as was referable to the annuity, in which case he is liable to account, or was intended merely as an arithmetical factor in the calculation of the annuity in which case he is not so liable: *Re Williams, Midland Bank Executor and Trustee Co Ltd v Williams* [1945] Ch 320 at 321-322, [1945] 2 All ER 102 at 104.

3 *Re Tatham, National Bank Ltd and Mathews v Mackenzie* [1945] Ch 34 at 43, [1945] 1 All ER 29 at 33. Instances of cases where it was held that on the construction of the document in question the gift was to be free of income tax at the full current rate without the annuitant being liable to account for reliefs are *Re Jones, Jones v Jones* [1933] Ch 842 (see note 5 infra); *Richmond's Trustee v Richmond* 1935 SC 56; *Rowan's Trustees v Rowan* 1940 SC 30, where the income 'actually received' by beneficiaries was required to be made up to a stated sum; *Re Swan, Hibernian Bank Ltd v Munro* [1945] IR 216.

4 See *Re Pettit, Le Fevre v Pettit* [1922] 2 Ch 765; *Milne's Trustees v Milne* 1936 SC 706; *Re Eves, Midland Bank Executor and Trustee Co Ltd v Eves* [1939] Ch 969; *Re Williams, Midland Bank Executor and Trustee Co Ltd v Williams* [1945] Ch 320, [1945] 2 All ER 102; *Re Dunville, Brownrigg v Dunville* [1947] NI 50, NI CA; *IRC v Cook* [1946] AC 1 at 14, [1945] 2 All ER 377 at 382, HL; *Re Lyons, Barclays Bank Ltd v Lyons* [1952] Ch 129, [1952] 1 All ER 34, CA, where the annuitant had obtained relief in respect of business losses by way of repayment of the tax paid in respect of the annuity; *Re Cochrane, Royal Bank of Ireland Ltd v Brooke-Alder* [1953] IR 160; *Re Vesey, Bank of Ireland v Power* [1958] IR 268.

5 *Re Maclennan, Few v Byrne* [1939] Ch 750, [1939] 3 All ER 81, CA; *Re Tatham, National Bank Ltd and Mathews v Mackenzie* [1945] 1 Ch 34, [1945] 1 All ER 29. Cf *Re Jones, Jones v Jones* [1933] Ch 842, where the gift was of such an annuity as after deduction of tax 'at the current rate' would amount to a specified clear yearly sum and the annuitant was held entitled to keep the recovered tax.

6 *Re Bates, Jenks v Bates* [1946] Ch 83, [1945] 2 All ER 688; *Re Arno, Healey v Arno* [1947] Ch 198, CA.

7 *Re Batley (No 2), Public Trustee v Hert* [1952] Ch 781, [1952] 2 All ER 562, CA.

8 *Re Kingcome, Hickley v Kingcome* [1936] Ch 566, [1936] 1 All ER 173; *Re Eves, Midland Bank Executor and Trustee Co Ltd v Eves* [1939] Ch 969; *Re Lyons, Barclays Bank Ltd v Lyons* [1952] Ch 129 at 137, [1952] 1 All ER 34 at 38, CA.

9 *IRC v Duncanson* [1949] 2 All ER 846.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(4) INCOME TAX AND INHERITANCE TAX/862. Inheritance tax.

## 862. Inheritance tax.

Unless the deceased's will provides otherwise, inheritance tax<sup>1</sup> in respect of the deceased's personal estate<sup>2</sup> in Great Britain (out of which an annuity may be payable by his will), which passes to the executor as such, is generally payable as a testamentary expense in the same order of administration as other testamentary expenses<sup>3</sup>. All other tax on a deceased's free estate for which the executor is liable, such as the deceased's realty which does not pass to the executor as such, is the subject of an Inland Revenue charge<sup>4</sup>. The burden of the tax falls rateably<sup>5</sup> on such property including any interests in it and legacies, including annuities, charged on it, except where the will under which those legacies and annuities are charged expressly provides otherwise<sup>6</sup>. The determination of the extent of a person's interest in settled property for the purpose of tax where he is entitled to a fixed annuity out of its income is dealt with elsewhere in this work<sup>7</sup>, as is the charge to tax in the event of such an annuity terminating as an interest in possession during the annuitant's lifetime or on his death<sup>8</sup>.

1 Inheritance tax (called, prior to the Finance Act 1986 s 100, capital transfer tax) replaced estate duty in respect of deaths after 12 March 1975 and is also levied on the making of certain transfers of property after 26 March 1974 during the transferor's lifetime: see INHERITANCE TAXATION vol 24 (Reissue) PARAS 401-403.

2 'Personal estate' includes leaseholds: see the Inheritance Tax Act 1984 s 237(3) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

3 See INHERITANCE TAXATION vol 24 (Reissue) PARA 651. As to the order of the application of assets in discharge of testamentary expenses see EXECUTORS AND ADMINISTRATORS.

4 See the Inheritance Tax Act 1984 s 237(1); and INHERITANCE TAXATION vol 24 (Reissue) PARA 683.

5 See *Berry v Gaukroger* [1903] 2 Ch 116, CA; *Re Thompson, Public Trustee v Husband*, as reported in [1936] 2 All ER 141 at 147. As to the principles of apportionment in respect of annuities as between an annuitant and other persons interested in property charged with inheritance tax see Foster *Inheritance Tax* vol 1, K 2.03. As to the general equitable principles relating to contribution see EQUITY vol 16(2) (Reissue) PARAS 458-459. Generally, personal representatives who pay tax on the value transferred by a chargeable transfer made on death can recover the tax, where occasion requires, from the person in whom the property charged is vested: see the Inheritance Tax Act 1984 s 211; and INHERITANCE TAXATION vol 24 (Reissue) PARA 651.

6 A direction that an annuity is to be paid without any deduction has been held to be such a provision: see *Re Parker-Jervis, Salt v Locker* [1898] 2 Ch 643; *Re Lonsdale's Will Trusts, Lowther v Lowther* [1960] Ch 288, [1959] 3 All ER 679, CA.

7 See INHERITANCE TAXATION vol 24 (Reissue) PARA 483.

8 See INHERITANCE TAXATION vol 24 (Reissue) PARA 486 et seq. For the rules determining the value of a contract for an annuity payable on death for the purposes of inheritance tax see INHERITANCE TAXATION vol 24 (Reissue) PARA 625.

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## **(5) RECOVERY OF RENTCHARGES**

### **(i) In general**

#### **863. Remedies for recovering rentcharges.**

The following remedies<sup>1</sup> may be available for the recovery of a rentcharge: (1) distress<sup>2</sup>; (2) entry under an express or statutory power on the land charged<sup>3</sup>; (3) limitation under an express or statutory power of a term on trust to raise arrears<sup>4</sup>; (4) action on the covenant<sup>5</sup>; (5) action of



debt<sup>6</sup>; (6) sale or mortgage of the land charged<sup>7</sup>; (7) appointment of a receiver<sup>8</sup>; (8) proof in bankruptcy<sup>9</sup>.

- 1 As to the recovery of rentcharges created for charitable purposes see CHARITIES vol 8 (2010) PARA 440.
- 2 See PARAS 865, 869-870 post.
- 3 See PARAS 865, 871-873 post.
- 4 See PARAS 865, 874-875 post.
- 5 See PARA 876 post.
- 6 See PARAS 877-878 post.
- 7 See PARA 879 post.
- 8 See PARAS 866, 880-882 post.
- 9 See PARAS 883-884 post.

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#### **864. Power to pursue remedies concurrently.**

The owner of a rentcharge may be entitled to pursue several different remedies at the same time, in this respect resembling a mortgagee<sup>1</sup>, although he cannot obtain an injunction to restrain waste by the owner of the land out of which the rentcharge issues<sup>2</sup>. In the case of a rentcharge secured by a right of entry and also by a term, the right of entry does not destroy the term, nor does the term defeat the right of entry<sup>3</sup>.

- 1 *Searle v Cooke* (1890) 43 ChD 519 at 533, CA. See further MORTGAGE vol 77 (2010) PARA 101 et seq.
- 2 *Sandeman v Rushton* (1891) 61 LJ Ch 136. See also *Fairfield v Weston* (1824) 2 Sim & St 96.
- 3 *Doe d Butler v Lord Kensington* (1846) 8 QB 429.

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#### **865. Statutory remedies.**

The remedies of distress, entry and limitation of a term are given by statute to a person entitled to receive out of land<sup>1</sup>, or out of the income of land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land and whether by way of rentcharge or otherwise, not being rent incident to a reversion; and the remedies are subject and without prejudice to all estates, interests and rights having priority to the annual sum<sup>2</sup>. They are available so far as they might have been conferred by the instrument under which the annual sum arises, but not further<sup>3</sup>, and are available only if and so far as a contrary

intention is not expressed in that instrument and have effect subject to the terms of the instrument and to the provisions contained in it<sup>4</sup>.

The statutory powers and remedies apply where the instrument creating the annual sum comes into operation after 31 December 1881<sup>5</sup>. They apply whether the instrument conferring the power under which the annual sum was authorised to be created came into operation before, on or after that date unless that instrument or the instrument exercising the power otherwise directs<sup>6</sup>.

1 As to the substitution of a power to appoint a receiver for the remedies mentioned in the text in the case of a rentcharge charged on another rentcharge see PARA 866 post.

2 See the Law of Property Act 1925 s 121(1). The income of any land includes rents and profits: s 205(1) (xix). Section 121 does not apply to tithe redemption annuities: see PARA 757 ante.

3 Ibid s 121(1).

4 Ibid s 121(5).

5 Ibid s 121(7). As to the application of the statutory powers and remedies to compensation rentcharges for the extinguishment of manorial incidents see CUSTOM AND USAGE. Section 121 (as amended) re-enacts, with amendment, the Conveyancing Act 1881 s 44 (repealed), as amended by the Conveyancing Act 1911 s 6 (repealed). In the case of rents and annuities charged on land by instruments coming into operation before 1882 a power of distress is conferred by the Landlord and Tenant Act 1730 s 5: see PARA 753 ante.

6 Law of Property Act 1925 s 121(7).

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### **866. Rentcharge charged on another rentcharge.**

If a rentcharge or other annual sum (not being a rent incident to a reversion) is charged on another rentcharge<sup>1</sup> and the annual sum or any part of it is at any time unpaid for 21 days, the person entitled to receive the annual sum has power (without prejudice to any prior interest or charge) to appoint a receiver of the annual sum charged or any part of it, and the statutory provisions relating to the appointment, powers, remuneration and duties of a receiver<sup>2</sup> apply in like manner as if the person making the appointment were a mortgagee entitled to exercise his statutory power of sale, the annual sum charged were the mortgaged property, and the person entitled to it were the mortgagor<sup>3</sup>. This power to appoint a receiver takes effect, in the case of an annual sum charged on a rentcharge, in substitution for the remedies conferred in the case of annual sums charged on land by the provisions<sup>4</sup> previously mentioned<sup>5</sup>.

1 For the power to charge a rentcharge on another rentcharge see PARA 759 ante.

2 See the Law of Property Act 1925 s 101; and RECEIVERS vol 39(2) (Reissue) PARA 303; MORTGAGE vol 77 (2010) PARA 101 et seq.

3 Ibid s 122(2).

4 Ie those contained in ibid s 121 (as amended): see PARA 865 ante.

5 See ibid s 122(3). Section 122(3) differentiates between land and a rentcharge. In the Law of Property Act 1925, unless the context otherwise requires, 'land' includes a rentcharge: see PARA 761 ante.

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### **867. Exclusion of rule against perpetuities.**

The rule against perpetuities does not apply to the statutory powers or remedies<sup>1</sup> for the recovery of rentcharges<sup>2</sup>.

<sup>1</sup> The powers or remedies conferred by the Law of Property Act 1925 s 121 (as amended): see PARAS 865 ante, 869, 871, 874 post.

<sup>2</sup> Ibid s 121(6) (amended by the Perpetuities and Accumulations Act 1964 s 11(2)). It is considered that the amendment to the Law of Property Act 1925 s 121(6) was required because the Perpetuities and Accumulations Act 1964 s 11(1) only exempted rentcharges created after that Act. See also PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1006.

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### **868. Confusion of boundaries.**

Where the boundaries of land subject to a rentcharge are confused, the court may in certain circumstances give relief by directing the land so charged to be ascertained<sup>1</sup>, or, if this cannot be done, it seems that the court may possibly compel the person who has neglected his duty to keep the boundaries distinct, or those claiming under him, to render an equivalent in satisfaction of the rentcharge<sup>2</sup>.

<sup>1</sup> See BOUNDARIES vol 4(1) (2002 Reissue) PARA 914. As to the ascertainment of the land charged with a rentcharge in favour of a charity see CHARITIES vol 8 (2010) PARA 441.

<sup>2</sup> See *A-G v Stephens* (1855) 6 De GM & G 111 at 134.

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## **(ii) Distress**

### **869. Remedy by distress.**

A power of distress is of the essence of a rentcharge<sup>1</sup>. It may be given by express provision<sup>2</sup>. The statutory power of distress<sup>3</sup> is exercisable when an annual sum or any part of it charged on land or the income of land is unpaid for 21 days next after the time appointed for any payment in respect of it; in that event that person entitled to receive the annual sum may enter into and distrain on the land charged or any part of it, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears of it, and all costs and expenses occasioned by the non-payment, may be fully paid<sup>4</sup>.

In the case of rentcharges reserved on conveyances under the Lands Clauses Consolidation Act 1845, power is given to the owner of the rentcharge of distraining on the goods and chattels of the acquiring authority<sup>5</sup>; but since consideration may no longer comprise an annual rentcharge payable by the acquiring authority, this provision is of little practical effect<sup>6</sup>.

1 See PARA 753 ante.

2 A right of distress may be granted which extends to land other than the land charged: see PARA 758 ante.

3 As to the statutory remedies see generally para 865 ante.

4 See the Law of Property Act 1925 s 121(2). As to the restrictions on the levying of distress against servicemen not serving under regular engagements or their dependants see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2(2)(a), (3); and DISTRESS vol 13 (2007 Reissue) PARA 962.

5 See the Lands Clauses Consolidation Act 1845 s 11 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 551.

6 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 551.

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### **870. Extent of remedy.**

Where, before 1926, a rentcharge was held by several persons as tenants in common, each owner might distrain<sup>1</sup>. Since 1925 a legal rentcharge to which several persons are entitled will be vested in trustees of land and the beneficiaries may not distrain<sup>2</sup>.

A single owner of a rentcharge may not distrain for part of the rent on one piece of the land and for another part on the remainder<sup>3</sup>. Formerly, where an annuity was charged on an undivided moiety of land the distress might be limited to one half of the rents<sup>4</sup>.

Where a rentcharge is charged by will on land in the occupation of tenants and secured by a power of distress, the owner of the rentcharge must wait for payment until the first rent day which occurs after an instalment accrues due and is not entitled to require that any prior rent is to be kept in hand to answer the instalment<sup>5</sup>.

The owner of a rentcharge has been held entitled under an express power of distress to distrain on a stranger's goods upon the land charged<sup>6</sup>. The common law rules and statutory provisions which determine what goods may or may not be distrained in the case of distress for rent due from a tenant to a landlord are considered elsewhere in this work<sup>7</sup>. Statutes which have been passed since the coming into operation of the Landlord and Tenant Act 1730<sup>8</sup> and which in terms regulate the levying of distress only as between landlord and tenant do not in general apply to distress by the owner of a rentcharge<sup>9</sup>.

1 *Rivis v Watson* (1839) 5 M & W 255; *Harrison v Barnby* (1793) 5 Term Rep 246.

2 *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79. See PARA 760 ante.

3 *Owens v Wynne* (1855) 4 E & B 579.

4 *Ashwin v Bullock* (1899) 81 LT 48. Cf *Hills v Webber* (1901) 17 TLR 513, CA. As to the abolition of undivided shares in land at law see REAL PROPERTY vol 39(2) (Reissue) PARA 55.

5 *Hasluck v Pedley* (1874) LR 19 Eq 271.

6 See eg *Muspratt v Gregory* (1838) 3 M & W 677, Ex Ch; and see DISTRESS vol 13 (2007 Reissue) PARAS 928, 934.

7 See DISTRESS vol 13 (2007 Reissue) PARA 928 et seq.

8 See the Landlord and Tenant Act 1730 s 5, which extended to rents seek the like remedy of distress as in the case of rent reserved on a lease; and PARA 753 ante.

9 See *Miller v Green* (1831) 8 Bing 92, where the grantee of an annuity was not entitled to levy distress on standing crops under the Distress for Rent Act 1737 s 8 (as amended). Cf *Johnson v Faulkner* (1842) 2 QB 925, where the grantee of a rentcharge was entitled to distress on hay and straw in stack by virtue of the combined effect of the Distress for Rent Act 1689 s 3 (as amended) and the Landlord and Tenant Act 1730 s 5. See further DISTRESS vol 13 (2007 Reissue) PARA 929.

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### **(iii) Entry on the Land Charged**

#### **871. Express power of entry.**

Since 1925 an express power of entry has usually been omitted from deeds creating or reserving rentcharges in reliance on the statutory power<sup>1</sup>. In earlier deeds it was customary to give an express power of entry, which usually took the form of a power for the owner of the rentcharge in default of payment to enter and hold the land until satisfaction of the arrears<sup>2</sup>.

1 As to the statutory power see PARA 872 post.

2 See eg 2 Davidson's Conveyancing (4th Edn) 508; 1 Key and Elphinstone's Conveyancing Precedents (8th Edn) 337, 567. No legal demand for the rent is necessary: *Doe d Biass v Horsley* (1834) 1 Ad & El 766.

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#### **872. Statutory power.**

Where an annual sum is charged on land or on the income of land under an instrument coming into operation after 1881<sup>1</sup>, a statutory power of entry is conferred. The statutory power is exercisable if at any time the annual sum or any part of it is unpaid for 40 days next after the time appointed for any payment in respect of it; then, although no legal demand has been made for payment, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part of it, and take the income, until thereby or otherwise the annual sum and all arrears due at the time of his entry or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid<sup>2</sup>. Such possession, when taken, is without impeachment of waste<sup>3</sup>.

1 See the Law of Property Act 1925 s 121(1), (7); and PARA 865 ante.

2 Ibid s 121(3).

3 Ibid s 121(3). As to liability for waste see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 431 et seq.

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### **873. Covenants secured by power of re-entry.**

Sometimes the grantor of a rentcharge enters into covenants with the grantee, either in the form of positive covenants for repairing or building or doing other acts on the land, or of negative covenants restricting its user, and then secures the performance of these covenants by a power of re-entry. Apart from the power of re-entry, it is settled that the burden of positive covenants does not run with the land either at law or in equity so as to be enforceable against subsequent owners<sup>1</sup>. Negative covenants, however, are enforceable in equity against all subsequent owners, except purchasers for value in good faith of the legal estate without notice<sup>2</sup>.

1 *Haywood v Brunswick Building Society* (1881) 8 QBD 403, CA; *Hall v Ewin* (1887) 37 ChD 74, CA; and see EQUITY vol 16(2) (Reissue) PARA 615. The Law of Property Act 1925 s 79(1) does not seem to have altered the law in this respect: see EQUITY vol 16(2) (Reissue) PARA 618.

2 See *Re Nisbet and Potts' Contract* [1905] 1 Ch 391; affd [1906] 1 Ch 386, CA; the Law of Property Act 1925 s 79(2); and EQUITY vol 16(2) (Reissue) PARA 613 et seq. A restrictive covenant affecting unregistered land and entered into after 1925 may be registered as a land charge and is void against a purchaser of a legal estate for money or money's worth, unless so registered: Land Charges Act 1972 s 2(5), Class D(ii), s 4(6) (amended by the Finance Act 1975 s 52(1), Sch 12 paras 2, 18(1), (5); and the Inheritance Tax Act 1984 s 276, Sch 8 para 3(2)). See EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES. As to the effect of registration as constituting actual notice, and the protection of purchasers with constructive notice of unregistered charges, see EQUITY vol 16(2) (Reissue) PARAS 577, 583; LAND CHARGES. As to restrictive covenants affecting registered land see LAND REGISTRATION. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION. See also PARA 772 note 4 ante.

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### **(iv) Limitation of a Term on Trust to raise Arrears**

#### **874. Power to limit a term.**

Where rentcharges arose under instruments coming into operation before 1882, a power to limit a term on trust to raise arrears was frequently conferred by the instrument<sup>1</sup>. In the case of annual sums charged on land or on the income of land under instruments coming into operation after 1881<sup>2</sup>, this power is conferred on the owner by statute, so far as such a remedy might have been conferred by the instrument under which the rentcharge arises, but not further<sup>3</sup>.

1 See eg *Jenkins v Milford* (1820) 1 Jac & W 629, where the trustees were not ordered to give up possession, except on terms, even though the arrears of the annuity were paid. Cf *Fairfax v Gray* (1779) 2 Wm Bl 1326,

where it was held that the annuitant might distrain for arrears, even though the term was vested in him to secure payment; *Doe d Butler v Lord Kensington* (1846) 8 QB 429, where there was a term to secure an annuity, and the right of entry was not lost.

2 See the Law of Property Act 1925 s 121(1), (7); and PARA 865 ante.

3 See *ibid* s 121(4); and PARA 875 post.

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### **875. Exercise of statutory power.**

The statutory power to limit a term on trust to raise arrears is exercisable if at any time the annual sum or any part of it is unpaid for 40 days next after the time appointed for payment in respect of it<sup>1</sup>. Then, the person entitled to the annual sum, whether taking possession or not<sup>2</sup>, may by deed demise the land charged or any part of it to a trustee for a term of years, with or without impeachment of waste<sup>3</sup>, but a legal term of years absolute<sup>4</sup> cannot be created unless the annual sum is a rentcharge held for a legal estate<sup>5</sup>. The land may be demised on trust, by all or any of the means mentioned below, or by any other reasonable means, to raise and pay the annual sum and all arrears due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment of it or otherwise relating to it, including the costs of the preparation and execution of the deed of demise and the costs of the execution of the trusts of that deed<sup>6</sup>.

The means by which the annual sum, arrears, costs and expenses may be raised include (1) the creation of a legal mortgage<sup>7</sup> or a sale (effected by assignment<sup>8</sup> or sub-demise) of the term created in the land charged or any part of it<sup>9</sup>; and (2) the receipt of the income of the land comprised in the term<sup>10</sup>.

The surplus, if any, of the money raised, or of the income received, under the trusts of the deed must be paid to the person for the time being entitled to the land comprised in it in reversion immediately expectant on the term thereby created<sup>11</sup>.

1 Law of Property Act 1925 s 121(4), applying s 121(3) (see PARA 872 ante).

2 As to the power to take possession see PARA 872 ante.

3 Law of Property Act 1925 s 121(4). As to liability for waste see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 431 et seq.

4 See *ibid* s 205(1)(xxvii); and REAL PROPERTY vol 39(2) (Reissue) PARA 101.

5 *Ibid* s 121(4) proviso.

6 *Ibid* s 121(4).

7 See generally MORTGAGE vol 77 (2010) PARA 101 et seq.

8 As to conveyance by assignment see generally SALE OF LAND.

9 Law of Property Act 1925 s 121(4)(a).

10 *Ibid* s 121(4)(b).

11 *Ibid* s 121(4).

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## (v) Action on the Covenant

### 876. Covenant by landowner.

The due payment of a rentcharge is frequently secured by the covenant of the landowner who creates it<sup>1</sup>. The burden of such a covenant does not run with the land so as to bind subsequent owners of the land<sup>2</sup>; nor, it seems, does the benefit of the covenant run with the rentcharge so as to entitle subsequent owners of the rentcharge to sue<sup>3</sup>; and this rule is apparently unaffected by the statutory provision<sup>4</sup> which enables a person to take an interest in land or the benefit of any covenant even though not named in the instrument<sup>5</sup>.

Where in a marriage settlement a jointure is secured on land and is also secured by the settlor's covenant, the land is the primary source of payment<sup>6</sup>.

Where the right to recover a rentcharge as an interest in land is extinguished<sup>7</sup>, the remedy on a covenant to pay the rentcharge is extinguished also<sup>8</sup>.

1 The question as to what words amount to a covenant is discussed in Norton on Deeds (2nd Edn) 532 et seq; and see also DEEDS AND OTHER INSTRUMENTS. An agreement to sell land for an annuity to be charged on it in favour of the vendor for his life entitles him to the purchaser's personal covenant for payment: *Bower v Cooper* (1843) 2 Hare 408. Where an annuity was granted to commence on the grantor's death, and he charged it on land and covenanted that the annuitant might distrain for any arrears, and it turned out that the grantor was only a tenant for life of the land charged, the annuitant was allowed to recover arrears from the grantor's estate by an action on the covenant: *Monypenny v Monypenny* (1861) 9 HL Cas 114, approved in *Piggott v Stratton* (1859) 1 De GF & J 33 at 47. Cf *Teasdale v Teasdale* (1726) Cas temp King 59; *Ford v Tynte* (1865) 2 De GJ & Sm 557, where a jointure was charged on land in which the settlor had only a life interest, and his life interest was not affected by the charge. See also *Knight v Bowyer* (1857) 23 Beav 609; affd (1858) 2 De G & J 421.

2 *Haywood v Brunswick Building Society* (1881) 8 QBD 403 at 410, CA; *Austerberry v Oldham Corp*n (1885) 29 ChD 750 at 785, CA; and see *Brewster v Kidgill* (1697) 12 Mod Rep 166 at 170; *Butler v Archer* (1860) 12 ICLR 104; *Re Blackburn and District Benefit Building Society, ex p Graham* (1889) 42 ChD 343 at 350, CA.

3 *Milnes v Branch* (1816) 5 M & S 411; *Randall v Rigby* (1838) 4 M & W 130 at 135; *Kennedy's Executors v Stewart* (1836) 7 ILR 421n; and see notes to *Thursby v Plant* (1669) 1 Wm Saund (7th Edn) 277 at 303.

4 The Law of Property Act 1925 s 56, which is limited in its application to real property: see *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL; *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990.

5 *Grant v Edmondson* [1931] 1 Ch 1, CA; *White v Bijou Mansions Ltd* [1937] Ch 610 at 624-625, [1937] 3 All ER 269 at 277; affd [1938] 1 Ch 351, [1938] 1 All ER 546, CA; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61; EQUITY vol 16(2) (Reissue) PARA 618. It seems that the rule is also unaffected by the Law of Property Act 1925 s 79(1): see EQUITY vol 16(2) (Reissue) PARA 698.

6 *Lanoy v Duke and Duchess of Athol* (1742) 2 Atk 444; *Loosemore v Knapman* (1853) Kay 123.

7 See PARA 899 post.

8 *Shaw v Crompton* [1910] 2 KB 370, DC. This rule is no longer of importance, as the period of limitation applicable to actions to recover rentcharges (as to which see the Limitation Act 1980 ss 15, 38(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); para 899 post, and LIMITATION PERIODS vol 68 (2008) PARA 1016 et seq) and the period applicable to actions on covenants (as to which see the Limitation Act 1980 s 8; and LIMITATION PERIODS vol 68 (2008) PARAS 953, 976) are now normally of the same length, namely 12 years.



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## **(vi) Action of Debt**

### **877. Nature of remedy.**

Since the abolition of real actions<sup>1</sup>, a rentcharge in fee may be recovered in an action of debt from the terre-tenant (that is, the person in actual possession and enjoyment of the land) entitled to a freehold interest<sup>2</sup>, even where he is terre-tenant of part only of the land charged with the rent<sup>3</sup>.

1 See the Real Property Limitation Act 1833 s 36 (repealed).

2 *Varley v Leigh* (1848) 2 Exch 446, where the terre-tenant had personally covenanted to pay the rentcharge; *Thomas v Sylvester* (1873) LR 8 QB 368, where the decision was independent of covenant; *Bowman v Smith* (1885) 2 TLR 101; *Searle v Cooke* (1890) 43 ChD 519, CA; and see *Public Trustee v Scarr* [1939] 1 All ER 188. An action is not maintainable if the rentcharge issues out of foreign land: see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 381. As to the jurisdiction of a county court to entertain an action for the recovery of a rentcharge see COURTS.

3 *A-G v Shelly* (1712) 1 Salk 163; *A-G v Wyburgh* (1719) 1 P Wms 599; *Christie v Barker* (1884) 53 LJQB 537, CA; *Re Herbage Rents, Greenwich Charity Comrs v Green* [1896] 2 Ch 811 at 818. In such a case the terre-tenant would be entitled to contribution from owners of other parts of the land charged: *Christie v Barker* supra; *Re Herbage Rents, Greenwich Charity Comrs v Green* supra at 825. The court may direct an inquiry whether any, and what, other property is chargeable, in whose possession that land is, and what is its value: *A-G v Wyburgh* supra; *A-G v Jackson* (1805) 11 Ves 365; *A-G v Naylor* (1863) 1 Hem & M 809 (charity rentcharges); and see *Re Alms Corn Charity, Charity Comrs v Bode* [1901] 2 Ch 750 at 760.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(5) RECOVERY OF RENTCHARGES/(vi) Action of Debt/878. Who may be liable.

### **878. Who may be liable.**

In order that the terre-tenant be made liable in an action of debt, he must be 'pernor of the profits' of the land<sup>1</sup> (that is, the person who receives the profits), but he may be made liable whether he has or has not received the profits equal to the rentcharge claimed<sup>2</sup>. If the freeholder has an immediate right to take possession, he has sufficient 'pernancy of the profits' to render him liable<sup>3</sup>. Accordingly, a mortgagee who had never entered might formerly be liable where the mortgage was by conveyance of the fee simple<sup>4</sup>, and a highway authority may be liable<sup>5</sup>, but, even before any statutory power of disclaimer was conferred on liquidators of companies<sup>6</sup>, a company which was being wound up was not liable after the liquidator had repudiated the land charged<sup>7</sup>; nor is a tenant for years liable in such an action<sup>8</sup>.

In the case of rentcharges reserved on conveyances under the Lands Clauses Consolidation Act 1845, an express power of recovering arrears in a superior court is given to the owner of the rentcharge<sup>9</sup>; but since consideration may no longer comprise an annual rentcharge payable by the acquiring authority, this provision is of little practical effect<sup>10</sup>.

1 *Swift v Kelly* (1889) 24 LR Ir 478, Ir CA. For the meaning of 'terre-tenant' see PARA 877 ante.

- 2 *Pertwee v Townsend* [1896] 2 QB 129 (where *Odum v Thompson* (1893) 21 LR 394 was not followed); *Re Herbage Rents, Greenwich Charity Comrs v Green* [1896] 2 Ch 811 at 819.
- 3 *Cundiff v Fitzsimmons* [1911] 1 KB 513 at 518, DC.
- 4 *Cundiff v Fitzsimmons* [1911] 1 KB 513, DC.
- 5 *Foley's Charity Trustees v Dudley Corpn* [1910] 1 KB 317, CA; and see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 101, 108.
- 6 As to the statutory power of disclaiming land subject to onerous covenants see PARA 884 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 866 et seq.
- 7 *Re Blackburn and District Benefit Building Society, ex p Graham* (1889) 42 ChD 343, CA. The liquidator is not personally liable: see *Graham v Edge* (1888) 20 QBD 683, CA; and PARA 883 post.
- 8 *Re Herbage Rents, Greenwich Charity Comrs v Green* [1896] 2 Ch 811. A possible exception to the rule that a tenant for years is not liable to an action may exist where the tenant has deliberately paid the rentcharge to a person not entitled: *Re Herbage Rents, Greenwich Charity Comrs v Green* supra at 822, 824. The owner of the rentcharge may be entitled to distrain against the goods of a tenant for years of part of the land charged: see *Re Herbage Rents, Greenwich Charity Comrs v Green* supra at 815; and PARA 870 ante.
- 9 See the Lands Clauses Consolidation Act 1845 s 11 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 551.
- 10 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 551.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(5) RECOVERY OF RENTCHARGES/(vii) Sale or Mortgage of the Land Charged/879. Sale or mortgage by court order.

## **(vii) Sale or Mortgage of the Land Charged**

### **879. Sale or mortgage by court order.**

For the purpose of raising the arrears of a rentcharge, the court may order a sale or mortgage of the land charged, both where the rentcharge is expressly charged on the fee simple<sup>1</sup> and also where it issues out of the rents and profits<sup>2</sup>. The exercise of the jurisdiction is, however, discretionary<sup>3</sup>, and no order will be made where a sale is not necessary for any other purpose and it is advisable to wait<sup>4</sup>, or where an immediate sale ought not to be imposed on the parties interested<sup>5</sup>. If the rentcharge is secured by a term, the owner is not entitled to a sale of the fee simple but must resort to the term<sup>6</sup>.

If the land has been sold compulsorily, arrears are paid out of the purchase money<sup>7</sup>.

- 1 *Blackburne v Hope-Edwardes* [1901] 1 Ch 419 at 423. See also *Cupit v Jackson* (1824) 13 Price 721, Ex Ch; *Picard v Mitchell* (1851) 14 Beav 103; *Byam v Sutton* (1854) 19 Beav 556; *White v James (No 2)* (1858) 26 Beav 191; *Scottish Widows' Fund v Craig* (1882) 20 ChD 208 at 214; and see *Pettinger v Ambler* (1865) 34 Beav 542, where a reversion was sold.
- 2 *Hambro v Hambro* [1894] 2 Ch 564. Cf *Philipps v Philipps* (1844) 8 Beav 193.
- 3 *Hambro v Hambro* [1894] 2 Ch 564; *Blackburne v Hope-Edwardes* [1901] 1 Ch 419; *Clifford v Turrell* (1841) 1 Y & C Ch Cas 138. See also *Harrison v Mason* (1849) 12 I Eq R 245, where questions were raised between the tenant for life of the land and the remainderman.
- 4 *Graves v Hicks* (1841) 11 Sim 536 at 551.
- 5 *Taylor v Taylor, Re Taylor's Estate Act* (1874) LR 17 Eq 324; *Horton v Hall* (1874) LR 17 Eq 437; *Re Tucker, Tucker v Tucker* [1893] 2 Ch 323.

6 *Hall v Hurt* (1861) 2 John & H 76; *Blackburne v Hope-Edwardes* [1901] 1 Ch 419 at 423. Where a rentcharge was secured by a term and the land was settled, arrears were paid out of capital money without prejudice to any question between the tenant for life and remainderman: see *Re Duke of Manchester's Settlement* [1910] 1 Ch 106.

7 *Re Tinkler's Trusts* (1852) 5 De G & Sm 722.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(5) RECOVERY OF RENTCHARGES/(viii) Appointment of a Receiver/880. Appointment of receiver by court order.

### **(viii) Appointment of a Receiver**

#### **880. Appointment of receiver by court order.**

The appointment of a receiver may be obtained from the High Court by the owner of a rentcharge where his security is in jeopardy, for instance if the rents are not sufficient or the rentcharge has been long in arrear<sup>1</sup>. Receivers may also be appointed to enforce rentcharges which have been reserved on conveyances under the Lands Clauses Consolidation Act 1845<sup>2</sup>, or by statute charged on the tolls or rates of the undertaking<sup>3</sup>.

1 *Kelsey v Kelsey* (1874) LR 17 Eq 495 at 500; and see *Garfitt v Allen*, *Allen v Longstaffe* (1887) 37 ChD 48 at 50; *Sollory v Leaver* (1869) LR 9 Eq 22. See also *Pritchard v Fleetwood* (1815) 1 Mer 54; *Davis v Duke of Marlborough* (1818) 1 Swan 74 (further proceedings (1819) 2 Swan 108); *Brooks v Greathed* (1820) 1 Jac & W 176; *Tanfield v Irvine* (1826) 2 Russ 149, where the grantor of the rentcharge was abroad; and see RECEIVERS vol 39(2) (Reissue) PARAS 330 et seq, 355 et seq.

2 See the Lands Clauses Consolidation Act 1845 s 11 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 551; but see PARA 878 text and note 10 ante.

3 *Eyton v Denbigh, Ruthin and Corwen Rly Co* (1868) LR 6 Eq 14; and see RECEIVERS vol 39(2) (Reissue) PARA 355.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(5) RECOVERY OF RENTCHARGES/(viii) Appointment of a Receiver/881. Appointment of receiver out of court.

#### **881. Appointment of receiver out of court.**

Out of court, the appointment of a receiver by deed under special powers is also adopted as a means of securing an annuity<sup>1</sup>. Such an appointment may create an equitable charge<sup>2</sup>.

1 See RECEIVERS vol 39(2) (Reissue) PARA 304.

2 *Cradock v Scottish Provident Institution* [1893] WN 146; affd [1894] WN 88, CA.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(5) RECOVERY OF RENTCHARGES/(viii) Appointment of a Receiver/882. Rentcharge charged on another rentcharge.

## 882. Rentcharge charged on another rentcharge.

Where a rentcharge or other annual sum is charged on another rentcharge, the person entitled to receive the annual sum has statutory power to appoint a receiver of the annual sum charged if his rentcharge is in arrear for 21 days<sup>1</sup>.

1 See PARA 866 ante.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(5) RECOVERY OF RENTCHARGES/(ix) Bankruptcy or Winding Up/883. Rights of owner of rentcharge.

## (ix) Bankruptcy or Winding Up

### 883. Rights of owner of rentcharge.

If the terre-tenant (that is, the person actually in possession and enjoyment) of land subject to a rentcharge becomes bankrupt or, in the case of a company, is wound up, then the rights, in relation to the land, of the trustee in bankruptcy<sup>1</sup> or the general creditors in the winding up are subject to the interest of the owner of the rentcharge<sup>2</sup>, and the owner of the rentcharge remains entitled to pursue his statutory remedies<sup>3</sup> for its recovery, subject to any restrictions on their exercise which may be imposed by the legislation relating to bankruptcy or winding up<sup>4</sup>. The owner of the rentcharge is entitled to prove in the bankruptcy or winding up for the amounts due and unpaid up to the date of the bankruptcy order, or the date when the company went into liquidation, as the case may be, as if it accrued from day to day<sup>5</sup>. Unless he disclaims the land charged<sup>6</sup>, a trustee in bankruptcy is personally liable for instalments of a rentcharge falling due after his appointment<sup>7</sup>.

1 As to the principle that a bankrupt's property passes to the trustee in the same plight and condition in which it was in the bankrupt's hands see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 394.

2 See *Greaves v Tofield* (1880) 14 ChD 563 at 574, CA. As to the decision in this case see PARA 770 note 1 ante.

3 See PARA 865 et seq ante.

4 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 522, 560, 561 (position of secured creditors); COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 887 et seq (proceedings and processes against company in winding up).

5 See the Insolvency Act 1986 s 322; the Insolvency Rules 1986, SI 1986/1925, rr 4.92, 6.112; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 544; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 794. Where the bankrupt or the insolvent company was liable to pay the rentcharge merely by reason of priority of estate, as terre-tenant of the land charged, and was not under any contractual obligation to pay it, it seems that the owner of the rentcharge can prove or claim in the bankruptcy or winding up only if there was something due in respect of the rentcharge at the date of the bankruptcy order or the commencement of the winding up: see *Re Blackburn and District Benefit Building Society, ex p Graham* (1889) 42 ChD 343 at 348, CA, per Lord Esher MR and at 349-350 per Cotton LJ. As to the right to prove in respect of annuities payable under covenants see PARAS 888-889 post. It seems that the owner of a rentcharge is a secured creditor, at least where the bankrupt or the insolvent company was contractually liable to pay rentcharge. For the meaning of 'secured creditor' see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 560; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 109.

6 As to the effect of a disclaimer see PARA 884 post.

<sup>7</sup> See eg *Re Solomon, ex p Dressler* (1878) 9 ChD 252, CA; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 411. A liquidator is not personally liable to pay a rentcharge, but possibly the company's assets may be liable in an action against the liquidator as such: see *Graham v Edge* (1888) 20 QBD 683, CA.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(5) RECOVERY OF RENTCHARGES/(ix) Bankruptcy or Winding Up/884. Disclaimer.

#### **884. Disclaimer.**

A trustee in bankruptcy may disclaim land out of which a rentcharge issues if that land is burdened with onerous covenants<sup>1</sup>.

The disclaimer operates to determine as from its date the rights, interests and liabilities of the bankrupt and his estate in or in respect of the property disclaimed and discharges the trustee from all personal liability in respect of it, but, except so far as necessary for these purposes, the disclaimer does not affect the rights or liabilities of any other person<sup>2</sup>.

In the event of disclaimer the owner of the rentcharge may, in a proper case, apply to the court for a vesting order in respect of the land in question<sup>3</sup>. If he is injured by the operation of the disclaimer, he is deemed to be a creditor to the extent of the injury and may prove the same as a debt under the bankruptcy<sup>4</sup>. Where on a disclaimer land vests subject to a rentcharge in the Crown or any other person, that does not impose on the Crown or the other person or his successors in title any personal liability in respect of the rentcharge except as to sums accruing due after the Crown or the other person or someone claiming through them has taken possession or control of the land or entered into occupation of it<sup>5</sup>.

Similar provisions apply to disclaimer by the liquidator of a company<sup>6</sup>.

<sup>1</sup> See the Insolvency Act 1986 s 315 (as amended); and see *Re Mercer and Moore* (1880) 14 ChD 287. See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472. The power to disclaim lapses 28 days (or any extended period allowed by the court) after application is made to the trustee requiring him to decide whether to disclaim or not: see the Insolvency Act 1986 ss 316, 376; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 480.

<sup>2</sup> See *ibid* s 315(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 474.

<sup>3</sup> See *ibid* s 320; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 484 et seq.

<sup>4</sup> See *ibid* s 315(5); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 488.

<sup>5</sup> See *ibid* s 319; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 474.

<sup>6</sup> See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 866 et seq.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(6) RECOVERY OF ANNUITIES/(i) Administration Action/885. Right to judgment for administration.

## **(6) RECOVERY OF ANNUITIES**

### **(i) Administration Action**

#### **885. Right to judgment for administration.**

The legatee of an annuity charged on residue is entitled to a judgment for administration of the estate of the deceased<sup>1</sup>, but an annuitant whose annuity was granted by the deceased during his lifetime cannot obtain such a judgment unless his annuity is in arrears<sup>2</sup>.

1 *Wollaston v Wollaston* (1877) 7 ChD 58, where the annuity was also charged on real estate. Cf *Re Norman, Thackray v Norman* (1914) 111 LT 903. As to administration by the court see generally EXECUTORS AND ADMINISTRATORS.

2 See PARA 837 ante. Where a testator had during his life covenanted to pay an annuity to another for life, the court refused to restrain his executors from paying his simple contract debts without providing for the annuity, in the absence of evidence of past misapplication or probable future misapplication of assets: see *Read v Blunt* (1832) 5 Sim 567; and CIVIL PROCEDURE vol 11 (2009) PARA 470; EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(6) RECOVERY OF ANNUITIES/(i) Administration Action/886. Setting apart of fund.

### **886. Setting apart of fund.**

The legatee of a life annuity<sup>1</sup> charged on residue is entitled to have the estate cleared by payment of the debts, funeral and testamentary expenses but he is not entitled, in the absence of a trust for sale, to have the estate converted and invested in trustee securities<sup>2</sup>. On the other hand the residuary legatees may not insist upon any distribution until the annuitant has been properly secured<sup>3</sup>. The annuitant is entitled to have such a security as will make it practically certain that the annuity will be fully paid<sup>4</sup>. Where the court is administering an estate subject to a life annuity charged on income, and the testator's will contains no provision for setting aside a fund to meet the annuity, the court may set apart a sum sufficient when invested in approved securities to secure the annuity and divide the rest of the estate between the residuary legatees; this may be done as a matter of administration in spite of the annuitant's opposition<sup>5</sup>. In such a case the annuitant has the right to resort to the capital of the annuity fund in case of deficiency of income<sup>6</sup>. Where a testator directs the setting aside of a fund to meet an annuity and leaves to his trustees' discretion the appropriation and investment of the fund, and the trustees refuse or neglect to exercise their discretion, then unless the testator's intention appears to exclude such a course the court will follow its own established rule and direct the setting aside of such a sum as, invested in approved securities, will be sufficient to yield the amount of the annuity<sup>7</sup>. Where a testator directed his trustees to set apart an annuity and invest it in certain specified investments, they were held not to be entitled to set apart a different investment, although it was one authorised by statute for the investment of trust funds<sup>8</sup>.

In the absence of an express or implied provision in a testator's will that, when an annuity fund is set apart, the rest of his estate is to be discharged from the annuity, the setting apart of a fund does not exonerate the rest of the estate<sup>9</sup>. Where a fund set apart to meet an annuity is subsequently misappropriated by a trustee, the annuitant is entitled in administration proceedings to be reimbursed out of benefits given to the trustee by the will<sup>10</sup>.

1 As to the valuation of a perpetual annuity see PARA 799 ante.

2 *Re Parry, Scott v Leak* (1889) 42 ChD 570 at 584; and see *Burrell v Delevante* (1862) 30 Beav 550; *Re Potter, Potter v Potter* (1883) 50 LT 8; and EXECUTORS AND ADMINISTRATORS.

3 *Re Earle, Tucker v Donne* (1923) 131 LT 383 per Tomlin J. Where realty is charged in aid with annuities primarily payable out of personalty, the person who would, but for the annuities, be entitled to the income of

the realty must prove that the annuities are properly secured before he can call for payment of the income of the realty: *Re Earle, Tucker v Donne* supra. As to the position where a testator bequeaths life annuities out of wasting property see *Fryer v Buttar* (1837) 8 Sim 442; *Wightwick v Lord* (1857) 6 HL Cas 217; and EXECUTORS AND ADMINISTRATORS.

4 *Re Parry, Scott v Leak* (1889) 42 ChD 570 at 584.

5 *Harbin v Masterman* [1896] 1 Ch 351, CA, where a sum of £8,000 was set apart in 2.5% consols to ensure an annuity of £150. A sum may be set apart to provide for a contingent annuity: *Aaron v Aaron* (1852) 9 Hare 821. Where an annuity was charged by will on the testator's property in a newspaper, and the strict rules of the court as to the appropriation of funds to ensure an annuity could not be followed, the court approved an arrangement by which a fund to ensure the annuity was created by setting aside an annual sum out of the profits of publishing the newspaper: *Burton v Jackson* (1856) 2 Jur NS 224.

6 *Harbin v Masterman* [1896] 1 Ch 351 at 362, CA; and see PARA 827 ante.

7 *Prendergast v Prendergast* (1850) 3 HL Cas 195; *Re Vesey, Bank of Ireland v Power* [1958] IR 268; and see *Haggard v Neatby* (1854) Kay 379. Where the annuity is payable free of income tax, the capital sum to be set aside should be calculated by reference to the gross sum required to produce the stated amount of the annuity after deduction of income tax: see *Re Vesey, Bank of Ireland v Power* supra, where income tax at the rate prevailing at the date of the testator's death was used as the basis of calculation; see also *Re Williams, Williams v Templeton* [1936] Ch 509, [1936] 1 All ER 175, CA. Cf *Re Dunville, Brownrigg v Dunville* [1947] NI 50, NI CA, where it was held that the sum set aside should be sufficient to sustain a payment of each annuity free of tax at the rate from time to time prevailing, subject to any adjustment required by the former enactments relating to pre-war tax-free annuities, with the annuitant giving credit for a due proportion of reliefs and personal allowances. As to an annuitant's duty to give credit for reliefs and allowances see PARA 861 ante. As to the position where the testator directs investment in particular securities see the text and note 8 infra.

8 *Re Owthwaite, Owthwaite v Taylor* [1891] 3 Ch 494. The correctness of the decision in this case was doubted in *Re Warren, Public Trustee v Fletcher* [1939] Ch 684, [1939] 2 All ER 599. As to the investments authorised by statute for the investment of trust funds see the Trustee Investments Act 1961 and the orders made under that Act; and see TRUSTS vol 48 (2007 Reissue) PARA 1017 et seq.

9 See PARA 828 ante.

10 See *Morris v Livie* (1842) 1 Y & C Ch Cas 380; *Barnett v Sheffield* (1852) 1 De GM & G 371; *Chillingworth v Chambers* [1896] 1 Ch 685, CA, where the extent of the liability of a trustee beneficiary for breach of trust is discussed; and see generally TRUSTS.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(6) RECOVERY OF ANNUITIES/(i) Administration Action/887. Valuation of annuity; administration of estate of deceased grantor.

### **887. Valuation of annuity; administration of estate of deceased grantor.**

Where the estate of a person who has during his life covenanted to pay an annuity is being administered by the court on the footing that it is actuarially insolvent<sup>1</sup>, the annuitant is entitled to prove for the capital value of the annuity to be calculated actuarially on the basis of the annuitant's age and normal expectation of life<sup>2</sup>. Where the annuity is held on protective trusts by virtue of which it is liable to forfeiture during the annuitant's life but no person other than the annuitant can become interested under the trusts, the annuity is valued without regard to the possibility of forfeiture<sup>3</sup>.

<sup>1</sup> See PARA 836 ante.

<sup>2</sup> *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* [1945] Ch 72, [1944] 2 All ER 593. See further PARA 799 ante.

<sup>3</sup> *Re Sinclair, Allen v Sinclair, Hodgkins v Sinclair* [1897] 1 Ch 921; *Re Viscount Rothermere, Mellors, Basden & Co v Coutts & Co* [1945] Ch 72, [1944] 2 All ER 593. The rule stated in the text does not apply where the annuity is payable by virtue of a gift in the deceased person's will and not by virtue of a covenant by him during

his life (see *Carr v Ingelby* (1831) reported (1847) 1 De G & Sm 362; *Re Dempster, Borthwick v Lovell* [1915] 1 Ch 795; and EXECUTORS AND ADMINISTRATORS); nor does it apply in the case of an annuity granted by deed, if, on the forfeiture of the annuitant's interest, discretionary trusts take effect under which persons other than the annuitant may be interested (*Re Beecham's Settlement, Johnson v Beecham* [1934] Ch 183; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 503).

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(6) RECOVERY OF ANNUITIES/(ii) Bankruptcy/888. Proof in bankruptcy for annuity.

## **(ii) Bankruptcy**

### **888. Proof in bankruptcy for annuity.**

On the bankruptcy of the person liable for an annuity, future payments of the annuity may be proved as debts<sup>1</sup>, even though the annuity is contingent on the performance or non-performance of some act by the annuitant<sup>2</sup>.

1     le under the Insolvency Act 1986 s 382 (as amended): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 546, 602.

2     See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 503. The trustee in bankruptcy must make an estimate of the value of the debts which are provable but, by reason of being subject to a contingency, do not bear a certain value (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 493), and, if the annuitant dies after valuation and proof in bankruptcy and after receiving a dividend greater than the amount which the bankrupt would have had to pay if he had remained solvent, the excess cannot be recovered by the trustee in bankruptcy: *Re Pannell, ex p Bates* (1879) 11 ChD 914, CA. However, if the annuitant dies before the proof has been dealt with, the value of the annuity will be the amount of payments falling due up to the date of his death: *Re Dodds, ex p Vaughan's Executors* (1890) 25 QBD 529. As to the effect of bankruptcy and discharge in bankruptcy upon a covenant to charge an annuity on after-acquired property see *Lyde v Mynn* (1833) 1 My & K 683.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(6) RECOVERY OF ANNUITIES/(ii) Bankruptcy/889. Future maintenance payments.

### **889. Future maintenance payments.**

Future periodical payments under a court order in family proceedings or under a maintenance assessment made under the Child Support Act 1991 are incapable of valuation and are not provable in bankruptcy, and the spouse continues liable to make such payments notwithstanding his or her bankruptcy and subsequent discharge<sup>1</sup>.

1     See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 491; DIVORCE. Arrears of periodical payments cannot be recovered from a deceased spouse's estate whether solvent or insolvent: see DIVORCE.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(6) RECOVERY OF ANNUITIES/(iii) Other Remedies/890. Nature of remedies.



### **(iii) Other Remedies**

#### **890. Nature of remedies.**

Where the annuity is secured by a covenant, the annuitant may bring an action on the covenant<sup>1</sup>. He may also in a proper case obtain the appointment of a receiver<sup>2</sup>. Where the annuity is charged on land, the annuitant is also, as against the land, able to avail himself of the statutory remedies previously mentioned<sup>3</sup>.

1 See the cases as to rentcharges cited in PARA 876 note 1 ante.

2 See PARAS 880-882 ante.

3 See the Law of Property Act 1925 s 121 (as amended); and PARA 865 ante.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/3. PAYMENT AND REMEDIES/(6) RECOVERY OF ANNUITIES/(iii) Other Remedies/891. Effect of delay in enforcing remedies.

#### **891. Effect of delay in enforcing remedies.**

An annuitant is not precluded on the ground of laches from recovering proper arrears of the annuity, in an action for an account on the footing of wilful default against the trustees through whom the annuity is payable, merely because he has neglected for a considerable time to enforce punctual payment<sup>1</sup>. The statutory periods of limitation applicable to proceedings for the recovery of annuities are considered elsewhere in this work<sup>2</sup>.

1 *Re Rix, Rix v Rix* (1912) 56 Sol Jo 573; and see LIMITATION PERIODS vol 68 (2008) PARA 906. As to laches see generally EQUITY vol 16(2) (Reissue) PARA 910 et seq.

2 See LIMITATION PERIODS vol 68 (2008) PARAS 1107, 1158.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/4. EXTINGUISHMENT/(1) EXTINGUISHMENT OF RENTCHARGES/(i) Extinguishment by Release/892. Release of whole or part of charge.

## **4. EXTINGUISHMENT**

### **The National Assembly for Wales and the Welsh Ministers; transfer of functions**

As to the transfer of functions to the National Assembly for Wales and the Welsh Ministers, see the introductory note to this title.

### **(1) EXTINGUISHMENT OF RENTCHARGES**

#### **(i) Extinguishment by Release**

#### **892. Release of whole or part of charge.**

The owner of a rentcharge may extinguish the rentcharge by releasing it to the owner or owners of the land out of which it issues<sup>1</sup>. Where a person was entitled to land in fee and his wife, in the event of her surviving him, was entitled for life to a rentcharge issuing out of the land, and he and his wife mortgaged the land by a deed which purported to extinguish the rentcharge, her equity of redemption in the rentcharge was not released<sup>2</sup>.

A release of a portion of a rentcharge will operate as a release to that extent<sup>3</sup>, so that the owner of a rentcharge may release part of it without extinguishing the whole<sup>4</sup>.

1 Shep Touch (7th Edn) 340; Com Dig, Release (E 2); 18 Vin Abr 323, Release (T).

2 *Re Betton's Trust Estates* (1871) LR 12 Eq 553.

3 Co Litt 148a.

4 6 Bac Abr, Release (C) 3.

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### **893. Release of part of land.**

If the owner of a rentcharge issuing out of land releases from the rentcharge part of the land, the release does not extinguish the whole rentcharge but only operates to bar the right to recover any part of the rentcharge out of the land released, without prejudice to the rights of any person interested in the land remaining unreleased and not concurring in or confirming the release<sup>1</sup>. Where those persons concur, the rentcharge is not apportioned but is payable entirely out of the land remaining unreleased<sup>2</sup>. If they do not concur, they are liable to pay only a proportionate part of the rentcharge<sup>3</sup>.

1 Law of Property Act 1925 s 70, replacing the Law of Property Amendment Act 1859 s 10 (repealed). Formerly the effect of such a release would have been to extinguish the whole rentcharge: 6 Bac Abr, Release (C) 3; 18 Vin Abr 504-505, Rent (Ba); Shep Touch (8th Edn) 345.

2 *Price v John* [1905] 1 Ch 744.

3 *Booth v Smith* (1884) 14 QBD 318, CA. As to apportionment see PARA 842 et seq ante.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/4. EXTINGUISHMENT/(1) EXTINGUISHMENT OF RENTCHARGES/(ii) Extinguishment by Operation of Law/894. Statutory extinguishment.

### **(ii) Extinguishment by Operation of Law**

#### **894. Statutory extinguishment.**

Subject to the exceptions mentioned below, every rentcharge<sup>1</sup>, if it has not then ceased to have effect, is to be extinguished at the expiry of 60 years beginning with 22 July 1977<sup>2</sup>, or with the date on which it first became payable<sup>3</sup> or, in the case of a variable rentcharge, ceased to be variable<sup>4</sup>, whichever is the later, and at the expiration of that period the land<sup>5</sup> on which it was

charged or out of which it issued is to be discharged and freed from the rentcharge<sup>6</sup>. The extinguishment will not affect the exercise by any person of any right or remedy for the recovery of any rent which accrues before the rentcharge is so extinguished<sup>7</sup>.

There is exempted from extinguishment in this manner any rentcharge (1) which is, by virtue of any enactment or agreement or by custom, charged on or otherwise payable in relation to land wholly or partly in lieu of tithes<sup>8</sup>; or (2) which is of a kind exempted from the prohibition of new rentcharges<sup>9</sup>.

1 For the meaning of 'rentcharge' see PARA 774 note 1 ante.

2 Rentcharges Act 1977 s 3(1)(a).

3 Ibid s 3(1)(b). A rentcharge is treated as becoming payable for this purpose on the first day of the first period in respect of which it is to be paid, except where the rentcharge is variable (see s 3(4); and note 4 infra): s 13(3).

4 Ibid s 3(4). The statutory provisions for extinguishment do not apply to variable rentcharges (s 3(4)); but where such a rentcharge ceases to be variable, the statutory period of 60 years runs as from the date on which it ceased to be variable (s 3(4)). A rentcharge (at any time) is to be treated as variable if at any time thereafter the amount of the rentcharge will, or may, vary in accordance with the provisions of the instrument under which it is payable: s 3(5).

5 For the meaning of 'land' see PARA 761 note 1 ante.

6 Rentcharges Act 1977 s 3(1).

7 Ibid s 3(2).

8 Ibid s 3(3)(a). Tithe redemption annuities charged under the Tithe Acts 1936 and 1951 were extinguished as from 2 October 1977: see the Finance Act 1977 s 56; and PARA 757 ante.

9 Rentcharges Act 1977 s 3(3)(b). As to the rentcharges exempted from the prohibition of new rentcharges see s 2(3) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 15(1), (2)); and PARA 774 ante. Those exempted rentcharges defined as 'estate rentcharges' (see the Rentcharges Act 1977 s 2(4); and PARA 775 ante) will not be extinguished even if they are for amounts beyond the limits allowed for new rentcharges of that kind: see ss 2(5), 3(3)(b); and PARA 775 text and note 7 ante.

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### 895. Merger.

If a person is entitled absolutely and in his own right to a rentcharge issuing out of land, and the whole of the land is granted to him absolutely and in his own right, the rentcharge is extinguished at common law<sup>1</sup>. There is a complete extinguishment of the rentcharge if he becomes entitled absolutely and in his own right to part of the land by purchase<sup>2</sup>.

These rules depend on the doctrine of merger. According to the present law there is no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity<sup>3</sup>.

1 Shep Touch (8th Edn) 311; *Freeman v Edwards* (1848) 2 Exch 732 at 737; *Swinfen v Swinfen* (No 3) (1860) 29 Beav 199 at 206.

2 Co Litt 147b. If the rent is charged by way of further security on other land, and part of that other land is granted to the owner of the rentcharge, there is no extinguishment: Co Litt 147a.

3 See the Law of Property Act 1925 s 185; and REAL PROPERTY vol 39(2) (Reissue) PARA 256; EQUITY vol 16(2) (Reissue) PARAS 764-769.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/4. EXTINGUISHMENT/(1) EXTINGUISHMENT OF RENTCHARGES/(ii) Extinguishment by Operation of Law/896. Rules in equity.

### **896. Rules in equity.**

In equity, the rules applicable to the merger of estates in land and the merger of charges on land are, generally speaking, the same, and they depend largely on the parties' intention<sup>1</sup>. Where there is no direct evidence of intention, courts of equity presume that merger was not intended, if it was to the party's interest that merger should not take place<sup>2</sup>. In accordance with this rule, where a tenant for life of land pays off a charge on the inheritance then prima facie there is no merger, but the tenant for life is entitled to the charge for his own benefit<sup>3</sup>.

1 See EQUITY vol 16(2) (Reissue) PARA 764.

2 See EQUITY vol 16(2) (Reissue) PARA 767.

3 See EQUITY vol 16(2) (Reissue) PARA 767.

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### **897. Condition of merger.**

It is a condition of merger that the land and the charge should be held by the same person at the same time and in the same right<sup>1</sup>. Accordingly, where the owner of land out of which a rent issues grants that land to the owner of the rentcharge by way of mortgage, there is no extinguishment of the rent<sup>2</sup>. A rentcharge held by a person in his own right and issuing out of land would not merge in the fee of the land where it came to that person as personal representative<sup>3</sup>.

1 *Re Radcliffe, Radcliffe v Bewes* [1892] 1 Ch 227 at 231, CA.

2 *Elliot v Hancock* (1690) 2 Vern 143. Cf *Freeman v Edwards* (1848) 2 Exch 732.

3 See *Chambers v Kingham* (1878) 10 ChD 743 at 746.

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### **898. Death of rent owner intestate and without next of kin.**

If the owner of a rentcharge dies intestate and without statutory next of kin, the rentcharge passes with the rest of his residuary estate to the Crown as bona vacantia<sup>1</sup>.

1 See the Administration of Estates Act 1925 s 46(1) (as amended); and EXECUTORS AND ADMINISTRATORS.

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### **899. Extinguishment by lapse of time.**

Unless the period is extended by virtue of the statutory provisions relating to the effect of disability, acknowledgment, part payment, fraud and mistake<sup>1</sup>, a rentcharge<sup>2</sup> is normally wholly extinguished at the expiration of 12 years after a right of action to recover the same accrued<sup>3</sup> to the owner of it or to the person through whom he claims<sup>4</sup>.

1 See the Limitation Act 1980 ss 28-32 (as amended); and LIMITATION PERIODS vol 68 (2008) PARA 1168 et seq.

2 A rentcharge is land for the purpose of the Limitation Act 1980: see s 38(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4); and LIMITATION PERIODS vol 68 (2008) PARAS 1020-1021. Special provision is made as to the construction, in relation to rentcharges, of references to rights of action to recover land, to the possession of land or to dispossession: see the Limitation Act 1980 s 38(7), (8); and LIMITATION PERIODS vol 68 (2008) PARAS 1016 et seq, 1072 et seq.

3 As to the time when a right to recover a rentcharge is deemed to accrue see LIMITATION PERIODS vol 68 (2008) PARA 1043.

4 See the Limitation Act 1980 ss 15(1), 17; and LIMITATION PERIODS vol 68 (2008) PARAS 1016 et seq, 1095 et seq. Where the right to recover a rentcharge is barred, the right to enforce a covenant to pay the rentcharge is barred also: see PARA 876 ante. No action may normally be brought or distress made to recover arrears of rent (including a rentcharge) after the expiration of six years from the date when the arrears became due: ss 19, 38(1); and see LIMITATION PERIODS vol 68 (2008) PARA 1020 (meaning of 'rent' and 'rentcharge'); and PARAS 1021, 1033 (recovery of arrears).

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### **900. Application for redemption certificate.**

The owner<sup>1</sup> of any land<sup>2</sup> affected by a rentcharge<sup>3</sup> may apply to the Secretary of State<sup>4</sup> for a redemption certificate certifying that the rentcharge has been redeemed<sup>5</sup>. Every application must be in such form and contain such information and be accompanied by such documents as may be prescribed by regulations<sup>6</sup>. An application may only be made if the period for which the rentcharge concerned would remain payable if it were not redeemed is ascertainable<sup>7</sup>, and, in the case of a rentcharge which has at any time been a variable rentcharge, if it has ceased to be variable at the time of making the application<sup>8</sup>. A rentcharge must (at any time) be treated as variable if at any time thereafter the amount of the rentcharge will, or may, vary in accordance with the provisions of the instrument under which it is payable<sup>9</sup>.

1 For the meaning of 'owner' see PARA 775 note 3 ante. For the special provisions which apply where, in pursuance of the right of a public sector tenant to buy, the freehold is conveyed subject to a rentcharge, see

the Housing Act 1985 s 139(1), Sch 6 para 21; and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1867; and as to conveyance to a nominee purchaser under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (ss 1-38) (as amended) see s 34(6)-(8); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1647.

2 For the meaning of 'land' see PARA 761 note 1 ante.

3 For the meaning of 'rentcharge' see PARA 774 note 1 ante.

4 As to the Secretary of State see PARA 844 note 4 ante.

5 Rentcharges Act 1977 s 8(1). No application may be made under s 8 in respect of a rentcharge of a kind mentioned in s 2(3) (as amended) (ie of a kind exempted from the prohibition of new rentcharges: see PARA 774 ante), or s 3(3)(a) (ie of a kind charged on land wholly or partly in lieu of tithes: see PARA 894 ante): s 8(4). Sections 8-10 (as amended) apply with necessary modifications in cases where a rent reserved under a lease is legally apportioned conditional upon redemption under the Landlord and Tenant Act 1927 s 20 (as amended): see s 20(1) proviso (amended by the Rentcharges Act 1977 s 17(1), Sch 1 para 3; and the Housing Act 1980 s 143); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 281. The Rentcharges Act 1977 ss 8-10 (as amended) replaced the existing procedure contained in the Law of Property Act 1925 s 191 (repealed). These provisions for the redemption of rentcharges apply equally to the redemption of legally apportioned parts of rentcharges: see the Rentcharges Act 1977 s 13(2). For the meaning of 'legal apportionment' see PARA 844 note 6 ante.

6 Ibid s 8(2); and see the Rentcharges Regulations 1978, SI 1978/16, reg 4, Schedule, Forms 3, 4. As to the making of regulations see generally para 845 note 2 ante. Where the Secretary of State considers that any additional document or information ought to be furnished by the applicant, he may require the applicant to deliver to him such documents (including documents of title and, in the case of registered land, an authority to inspect the register) and to furnish him with such information as the Secretary of State may specify: Rentcharges Act 1977 s 8(3). This reference to an authority to inspect the register does not appear to have been repealed or amended, despite the substitution of the Land Registration Act 1925 ss 112-112C by the Land Registration Act 1988 s 1. Under the Land Registration Act 1925 s 112 (as so substituted), however, any person may, subject to such conditions as may be prescribed and on payment of any fee payable, inspect and make copies of and extracts from (1) entries on the register; and (2) documents referred to in the register which are in the custody of the registrar, other than leases or charges or copies of leases and charges: see s 112(1) (as so substituted); and LAND REGISTRATION. It would appear that an authority to inspect the register is not now required. The system of compulsory registration of title on sale of land now extends to the whole of England and Wales with effect from 1 December 1990 (see the Registration of Title Order 1989, SI 1989/1347); and the categories of disposition to which the requirement of registration applies are extended by the Land Registration Act 1925 ss 123, 123A (respectively substituted and added by the Land Registration Act 1997 s 1, both as from 1 April 1998): see the Land Registration Act 1997 (Commencement) Order 1997, SI 1997/3036, art 2; and LAND REGISTRATION. See also PARA 772 note 4 ante.

Where an applicant's documents of title are in the custody of a mortgagee, the mortgagee, if requested to do so by the Secretary of State, must deliver those documents to the Secretary of State on such terms as to their custody and return as the mortgagee may reasonably require: Rentcharges Act 1977 s 8(6). Any expenses incurred by any person in connection with an application for a redemption certificate must be borne by that person (s 15(2)), and regulations provide for the reasonable expenses of a person other than the applicant, or of a mortgagee, incurred in complying with a request of the Secretary of State under s 8(6) to be borne by the applicant (see s 15(3); and the Rentcharges Regulations 1978, SI 1978/16, reg 6).

7 Rentcharges Act 1977 s 8(5)(a).

8 Ibid s 8(5)(b).

9 Ibid s 8(5).

## UPDATE

### 900 Application for redemption certificate

NOTE 6--Land Registration Act 1925 replaced by the Land Registration Act 2002; see LAND REGISTRATION.

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### **901. Issue of redemption certificate.**

Where an application for a redemption certificate has been duly made<sup>1</sup>, the Secretary of State<sup>2</sup> must serve<sup>3</sup> notice of the application on the person appearing to him to be the rent owner<sup>4</sup> in relation to the rentcharge<sup>5</sup> to which the application relates or his agent<sup>6</sup>. A notice of application must require the person on whom it is served to notify the Secretary of State, before the expiry of the period of 21 days beginning with the date on which it is served, whether or not he is the rent owner in relation to that rentcharge<sup>7</sup>.

Where the Secretary of State has been so notified, or the period of 21 days has expired without his being so notified, he must serve instructions for redemption on the applicant for the redemption certificate<sup>8</sup>, specifying the sum required to redeem the rentcharge (the 'redemption price')<sup>9</sup>, and naming the person, if any, appearing to the Secretary of State to be the person to whom the redemption price should be paid by the applicant<sup>10</sup>.

After service of instructions for redemption, the Secretary of State must issue the applicant with a redemption certificate on proof (1) that the applicant has, before the expiry of the period of 28 days beginning with the date on which the instructions are served, paid the amount specified as the redemption price to the person named in the instructions as the person to whom payment should be made<sup>11</sup>, or where no person is so named, paid that amount into court<sup>12</sup>; or (2) where the applicant has been authorised to do so, that he has paid that amount into court<sup>13</sup> before the expiry of that period (or such longer period as the Secretary of State may allow)<sup>14</sup>.

Where a redemption certificate has been issued, it has the effect of releasing the applicant's land from the rentcharge concerned<sup>15</sup>, but it does not affect the exercise by the rent owner of any right or remedy for the recovery of any rent which accrues before the date on which it was issued<sup>16</sup>.

1    le under the Rentcharges Act 1977 s 8: see PARA 900 ante.

2    As to the Secretary of State see PARA 844 note 4 ante.

3    As to the service of documents see PARA 848 ante.

4    For the meaning of 'rent owner' see PARA 775 note 4 ante.

5    For the meaning of 'rentcharge' see PARA 774 note 1 ante.

6    Rentcharges Act 1977 s 9(1).

7    Ibid s 9(2). Notification under s 9(2) must be given in the form prescribed by regulations and contain such information, and be accompanied by such documents, as may be so prescribed: s 9(3); and see the Rentcharges Regulations 1978, SI 1978/16, reg 5, Schedule, Form 5. As to the making of regulations see generally para 845 note 2 ante. It is an offence punishable on summary conviction by a fine not exceeding level 5 on the standard scale for a person, when notifying the Secretary of State under the Rentcharges Act 1977 s 9(2), to make a statement which he knows to be false in a material particular, or recklessly to make a statement which is so false: s 10(5) (amended by virtue of the Criminal Justice Act 1982 ss 37, 46). The 'standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37(2) (as substituted): Interpretation Act 1978 s 5, Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(a)). See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 1991 s 18 (substituted by the Criminal Justice Act 1993 s 65); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

8 Rentcharges Act 1977 s 9(4).

9 Ibid s 9(4)(a). The redemption price is calculated in accordance with s 10(1): see PARA 902 post.

10 Ibid s 9(4)(b). The person to whom the redemption price should be paid is (1) in a case where the rentcharge was subject to a mortgage, the mortgagee, or, if there is more than one mortgagee, the first mortgagee; (2) in a case where the rentcharge was not subject to a mortgage but was settled land or was subject to a trust of land, the trustees; and (3) in any other case, the rent owner: s 10(2)(a)-(c) (s 10(2)(b) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 15(1), (3)).

11 Rentcharges Act 1977 s 9(5)(a)(i).

12 Ibid s 9(5)(a)(ii). Where a payment is made into court, the sum concerned must, if it does not exceed £5,000, be paid into the county court (s 10(4)(a) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule)), and in any other case be paid into the High Court (Rentcharges Act 1977 s 10(4)(b)). Where the sum is to be paid into the county court, it must be paid into the court for the district in which the land affected by the rentcharge or any part of it is situated: CCR Ord 49 r 16.

13 Ibid in accordance with the Rentcharges Act 1977 s 10(4) (as amended): see note 12 supra.

14 Ibid s 9(5)(b). For the purposes of s 9(5)(b), the Secretary of State may authorise payment into court in any case where he is satisfied that the applicant is unable to effect payment in accordance with the instructions for redemption or that it would be unreasonable to require him to do so: s 9(6).

15 Ibid s 10(3)(a).

16 Ibid s 10(3)(b).

## UPDATE

### 901 Issue of redemption certificate

NOTE 7--1991 Act s 18, consolidated in the Powers of Criminal Courts (Sentencing) Act 2000 s 128, repealed: Criminal Justice Act 2003 Sch 37 Pt 7. See now s 162.

NOTE 12--CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### 902. Calculation of redemption price.

The redemption price to be inserted in the instructions for redemption<sup>1</sup> is calculated by applying the statutory formula<sup>2</sup>.

1 As to the instructions for redemption see PARA 901 ante.

2 See the Rentcharges Act 1977 s 10(1). The statutory formula is:  $P \text{ equals } R \text{ over } Y \text{ minus } R \text{ over } Y(1+Y)^n$ , where P is the redemption price in pounds sterling; R is the annual amount of the rentcharge to be redeemed; Y is the yield, expressed as a decimal fraction, from 2.5% Consolidated Stock; and n is the period, expressed in years (taking any part of a year as a whole year), for which the rentcharge would remain payable if it were not redeemed: see s 10(1). The first half of the formula capitalises the annual amount of the rentcharge to produce a sum which, if invested in 2.5% Consolidated Stock, would provide by way of income an annual sum in perpetuity equal to the amount of the rentcharge. However, every rentcharge to which the statutory redemption provisions apply will, under s 3 (see PARA 894 ante), have ceased to be perpetual, and the redemption price must be progressively reduced as the rentcharge approaches extinction at the end of the



term. The standard method of calculating such a reduction is provided by the second half of the formula. As the life expectation of the rentcharge decreases, the sum produced by the second half of the formula increases until, eventually, it almost equals the sum from which it is to be deducted.

In calculating the yield from 2.5% Consolidated Stock, the price of that stock is to be taken to be the middle market price at the close of business on the last trading day in the week before that in which instructions for redemption are served: s 10(1).

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### **903. Application of capital money in redemption.**

Among the purposes for which capital money arising under the Settled Land Act 1925<sup>1</sup> may be used are the discharge, purchase or redemption of incumbrances affecting the whole estate the subject of the settlement, or of any charge in respect of an improvement created on a holding under the Agricultural Holdings Act 1986<sup>2</sup> or any similar previous enactment<sup>3</sup>; or the redemption of an improvement rentcharge<sup>4</sup>.

1 Subject to certain exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see REAL PROPERTY vol 39(2) (Reissue) PARA 65.

2 See the Agricultural Holdings Act 1986 ss 86, 87; and AGRICULTURAL LAND vol 1 (2008) PARA 476 et seq.

3 See the Settled Land Act 1925 s 73(1)(ii) (amended by the Finance Act 1963 s 73(8)(b), Sch 14 Pt VI; and the Agricultural Holdings Act 1986 s 100, Sch 14 para 11). Capital money might also formerly be applied in the discharge, purchase or redemption of quit rents or tithe rentcharge: see the Settled Land Act 1925 s 73(1)(ii) (as originally enacted). As to the extinguishment of quit rents see PARA 756 ante. As to the general extinguishment of the tithe rentcharge see ECCLESIASTICAL LAW. Capital money might formerly be applied in the redemption of compensation rentcharges for the extinguishment of manorial incidents: see s 73(1)(viii); and as to the power to raise money by mortgage for discharging an incumbrance on settled land or redeeming a compensation rentcharge see s 71(1)(i), (vi); and SETTLEMENTS. For the purposes for which capital money may be applied see generally SETTLEMENTS; and as to capital money see also the Agricultural Tenancies Act 1995 s 33(1); and AGRICULTURAL LAND vol 1 (2008) PARA 310 et seq.

4 Ibid s 73(1)(xiii). See also the Agricultural Credits Act 1932 s 3 (repealed by the Agriculture and Forestry (Financial Provisions) Act 1991 s 1, Schedule Pt II, without affecting mortgages or debentures subsisting when the repeals took effect, ie 25 September 1991: Agricultural Mortgage Corporation (Specified Day for Repeals) Order 1991, SI 1991/1937).

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### **904. Insufficiency of redemption money.**

Where a rentcharge settled for the benefit of different persons in succession has been compulsorily redeemed and the redemption money is invested in the trustees' names for the benefit of the tenant for life and remaindermen and the income is insufficient to pay the annual amount equal to the former rentcharge, the trustees may be directed to sell sufficient capital from time to time to provide that amount<sup>1</sup>.

1 *Re Carr's Settlement, Riddell v Carr* [1933] Ch 928.

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### **905. Discharge of rentcharge by court on sale of land affected.**

Where land subject to an annual sum charged on it is sold or exchanged, the court may, if it thinks fit, on the application of a party to the sale or exchange, allow payment into court of such an amount as, when invested in government securities, will by its dividends provide for the sum charged, together with an additional amount to meet the contingency of further costs, expenses and other contingencies, except depreciation of investments, and may declare the land to be freed from the rentcharge<sup>1</sup>.

1 See the Law of Property Act 1925 s 50(1), (2); and MORTGAGE vol 77 (2010) PARA 101 et seq; SALE OF LAND.

Halsbury's Laws of England/RENTCHARGES AND ANNUITIES (VOLUME 39(2) (REISSUE))/4. EXTINGUISHMENT/(2) EXTINGUISHMENT OF ANNUITIES/906. Release or redemption.

## **(2) EXTINGUISHMENT OF ANNUITIES**

### **906. Release or redemption.**

An annuity may be extinguished by release on the annuitant's part<sup>1</sup>.

Unless there is a special provision for redemption in the deed granting the annuity, an annuity granted by deed is not redeemable<sup>2</sup>.

However, an annuity charged on a house by a charging order under the Housing Act 1985<sup>3</sup> may be redeemed by the owner or other person interested in the premises on payment to the person entitled to the annuity of such sum as, in default of agreement, may be determined by the Secretary of State<sup>4</sup>.

1 See *Shep Touch* (8th Edn) 322, 342. The release should, generally speaking, be by deed: see DEEDS AND OTHER INSTRUMENTS.

2 *Coverley v Burrell* (1821) 5 B & Ald 257 at 259 per Abbott CJ (decided when the grant of annuities was an ordinary mode of raising money). See also *Irnham v Child* (1781) 1 Bro CC 92. Where provision for redemption is contained in the deed, an annuity is redeemable: see eg *King v Chaplin* (1863) 9 Jur NS 984.

3 As to such annuities see PARA 809 ante.

4 See the Housing Act 1985 s 230(6) (repealed as from 1 April 1990 by the Local Government and Housing Act 1989 ss 165(1)(a), 194(4), Sch 9 Pt I para 13, Sch 12 Pt II, except in relation to improvement notices served on, or orders made, under the Housing Act 1985 ss 214, 215 (repealed) before that date); and PARA 809 ante.

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### 907. Forfeiture.

An annuity may be liable to extinguishment by forfeiture if the will or other instrument by which it was granted so provides<sup>1</sup>. The annuity will not, however, be extinguished if the trusts upon which it is held are such<sup>2</sup> that the effect of a forfeiture would be merely to terminate the annuitant's original interest, and the annuity continues to be payable for the benefit of any class of beneficiaries<sup>3</sup>.

1 For an example of forfeiture see *Adams v Adams* [1892] 1 Ch 369, CA. Cf *Re Furness, Wilson v Kenmare* [1944] 1 All ER 575, CA, where a clause providing for forfeiture if certain acts or events took place without the consent of the grantor of the annuity was held not to extend to an act of the legislature. As to the operation of forfeiture clauses see further SETTLEMENTS.

2 For an instance of such trusts see the Trustee Act 1925 s 33 (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 2); and SETTLEMENTS.

3 See eg *Re Beecham's Settlement, Johnson v Beecham* [1934] Ch 183; and see PARA 887 note 3 ante.